

Cour d'Appel

Montréal

En appel de la décision rendue le 26 juillet 1991 par
l'honorable [REDACTED] par
distribution [REDACTED] re,

Nos: [REDACTED]

LE PROCUREUR GÉNÉRAL DU CANADA
APPELANT-Intimé

c.

RJR-MacDONALD INC.
INTIMÉE-Requérante

-et-

[REDACTED]

LE PROCUREUR GÉNÉRAL DU CANADA
APPELANT-Intimé

c.

IMPERIAL TOBACCO LTD
INTIMÉE-Requérante

-et-

LE PROCUREUR GÉNÉRAL DU QUÉBEC
MIS EN CAUSE-Mis en cause

DOSSIER CONJOINT
Volume LVI: pages 10968 à 11164
(Dépositions)

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Le 18 juin 1990 (Suite)

In the year of Our Lord nineteen hundred and ninety (1990),
on this eighteenth (18th) day of the month of June,

PERSONALLY CAME AND APPEARED:

5 Me CHERNIAK:

For RJR, Earl Cherniak.

Me DUNBERRY:

For Imperial Tobacco, Eric Dunberry.

Me EVRAIRE:

10 Pour le Procureur général du Canada, maîtres Claude
Joyal, Roger Baker, Lorianne Weston, Lise Tremblay et
Paul Evraire.

In the year of Our Lord nineteen hundred and ninety (1990),
on this eighteenth (18th) day of the month of June,
PERSONALLY CAME AND APPEARED:

5 DAVID MICHAEL BURNS,

WHO, having previously been sworn on the Holy Bible, doth
depose and say as follows:

10 CROSS-EXAMINATION BY Me EARL A. CHERNIAK, Q.C.,

On behalf of Petitioner, RJR-Macdonald Inc.:

Q- So I just want to make sure that I understand this, Dr.
Burns. If we go back to page XXII in chapter XVI. The
learned authors who wrote that article talked about the
15 major variables contributing to initiation under the
heading: "The Establishment of Smoking". Fourth line:

"Among the major variables contributing to
initiation, social pressure, imitation of
peers or family members who smoke."

20 They call them the major variables.

A- It says: "Among the major variables".

Q- "Among the major variables". And then they talk about
the variables -- another group of variables that
influence the decision to smoke:

25 "Peer pressure, best friends who are smokers,

parents who smoke, adolescent rebellion,
imitation of adult behaviour and
misconceptions concerning the risks of
smoking."

5 Right? That's what they say?

A- That is what they say, the...

Q- That's what...

A- It is...

Q- The only...

10 A- ... a characterization of the same variables, yes.

Q- Right. And as I understand it, the purpose of the
nineteen seventy-nine (1979) report was to bring in one
place the best research up to that point?

A- That's right.

15 Q- And nowhere in this chapter do these learned authors
even mention advertising as being among the major
variables or among the variables at all, do they? Do
they?

A- They do not mention the word "advertising". I think you
20 have misunderstood the way they are presenting the
topic.

Q- All right. No, no. It's not a question of what I
understand.

A- They have not used...

25 Q- It's a question of what we read.

A- They have not used the term "advertising".

Q- And they haven't used anything like it. They haven't used "media", they haven't used -- they haven't used "outside pressures", "outside -- outside" -- what they talked about.

A- I'm not sure how one characterizes as an internal pressure social pressure and peer pressure. Those are outside pressures, are they not?

Q- Well, we know what peer pressure is though. Peer pressure is the pressure of one's friends, right?

A- The opinions and behaviors of one's friends, yes.

Q- Yes. Best friends who are smokers?

A- Best friends who are smokers, that's correct.

Q- Parents who smoke?

A- That's right.

Q- Yes. Adolescent rebellion?

A- Adolescent rebellion.

Q- Imitation of adult behaviour?

A- That's correct.

Q- In other words, watching what adults do?

A- And the perception of what adult behaviour is.

Q- Well, yes, I suppose, in the perception of what adult behaviour is, but nowhere is the word "advertising" or "media" even mentioned among -- by these authors who are talking about, the whole chapter devoted to the

establishment of smoking.

A- I disagree with your characterization.

Q- Is it mentioned, sir? Show me where it's mentioned.

Me EVRAIRE:

5 Let the witness answer.

A- Yes, as I've said, the term "advertising" is not mentioned. What is mentioned is one formulation...

Me CHERNIAK:

Q- Right. So...

10 A- ... of the way...

Me EVRAIRE:

Let the witness answer.

A- ... of the way an individual adolescent is influenced to smoke.

15 Me CHERNIAK:

Q- Not one formulation. It is the author's conclusions based on a review of the extant literature up to that point as to the -- as to how and why smoking is established. That's what it is, isn't it?

20 A- It is a review of that and in any discussion of a sociologic process, one is obligated to categorize it in certain ways.

Q- Sure, okay.

A- They have chosen to categorize this along the lines of
25 variables that have been measured in studies.

Advertisement, as it is currently felt by the people who are dealing with smoking as an issue...

Q- No, no...

A- ... is one that influences the variables that you have in front of you.

Me CHERNIAK:

My Lord, I didn't ask him anything about -- I didn't ask him about what other people think. I asked him what these people talked about in this chapter. It's totally unresponsive to my question to start making a speech about what he thinks advertising does or does not do. It was no part of my question.

Me EVRAIRE:

Well, My Lord, my friend seems to think that every time he gets an answer he doesn't like that that's not responsive. I think the witness should be allowed to answer the question as he sees fit with whatever qualifiers are necessary. He's answered it yes or no and then qualified it, as Your Lordship has permitted other experts to do.

THE COURT:

I think he's answered the question as it was put to him and he's putting a little bit more which wasn't asked for.

Me CHERNIAK:

All right.

THE COURT:

Anyways, move on.

5 Me CHERNIAK:

Q- Now, in nineteen eighty-five (1985), you were examined in -- remember, you told us the other day that you gave evidence in certain of the tobacco-related personal injury litigation in the United States?

10 A- Yes, I believe I've testified in a trial in Knoxville and one in Mississippi.

Q- And one of those cases was the Roysdon case in Tennessee?

A- That's right.

15 Q- And you were deposed in that -- I'm sorry. You actually gave evidence at the trial in that case?

A- That's correct.

Q- And I want to read you a question and an answer.

Me EVRAIRE:

20 Does my friend have an extra copy?

Me CHERNIAK:

I'm sorry?

Me EVRAIRE:

Do you have an extra copy?

25

Me CHERNIAK:

Yes, I do and I'm going to give it to you. So, just so you've got a copy of it in front of you.

A- M'hm.

5 Q- Would you please turn to page six forty-five (645).

THE COURT:

I'm sorry? Six forty-five (645)?

Me CHERNIAK:

Six forty-five (645).

10 Q- And you ask this question on page six forty-five (645) of that transcript:

"Q. The decision to smoke is one which is a matter of free choice and if you exercise that free choice to smoke, then it's important that you take personal responsibility for that decision, isn't it?"

Your answer:

"I disagree it's a matter of free choice. Everything we know about why adolescents take up cigarette smoking indicates it's a response to a variety of pressures in their life rather than a free choice. They usually, as far as literature can tell us, take up smoking as a direct result of peer pressure ..."

25 -- I like the way they spell "peer"

"... peer pressure, influences of friends,
influences of parents, influences of older
siblings. Those are very powerful
constraining influences that at least, to my
5 mind, are not part of a free choice."

Were you asked that question, did you make that answer?

A- I did.

Q- And will you show me, sir, where, when you outline the
variety of pressures that influence adolescents to
10 smoke, where you said anything about the influence of
media or advertising?

A- Could I ask you to clarify that question as to whether
you were asking me whether the word advertising appears
in the answer or whether that sentence includes
15 influences of advertising?

Q- Well, we can all read the English language. We know the
word advertising doesn't appear there.

A- Yes.

Q- You don't have anything in that answer that relates to
20 the influences of media, of advertising on the decision
to smoke. You talk about peer pressure, friends,
parents, older siblings.

A- I did not use the words "advertising," I did not use the
words "media."

25 Q- Thank you.

A- I would be happy to explain why I think advertising is part of that if you would like.

Q- No, no, you gave the answer, sir, and you -- you had an opportunity if you want, because you were saying whatever you wanted there. It wasn't a particularly responsive answer to the question. You had the opportunity, when you gave that answer, to talk about the things that you thought were the major influences in the decision to smoke. You could have said anything that you wanted there, couldn't you?

A- I could.

Q- Yes.

A- And I think that, as I've explained earlier, that advertising is a major influence on these variables.

Q- Sure.

A- Whenever one examines a complex social phenomenon, one is obligated to categorize it in certain ways.

Q- Okay.

A- That does not mean that the term one uses for that categorization excludes all other influences.

Q- Can we make this transcript the next exhibit, sir?

Me EVRAIRE:

Does my friend have the subsequent pages beyond six forty-five (645) available?

Me CHERNIAK:

No.

Me EVRAIRE:

No. Thank you. I take it the transcript didn't end at
5 the bottom of six forty-five (645); is that correct?

Me CHERNIAK:

I'm sure it didn't.

Me EVRAIRE:

Thank you.

10 THE COURT:

Are you filing the whole thing or just page six
forty-five (645).

Me CHERNIAK:

15 Actually, just file six forty-five (645). I did refer
-- there are other questions and answers there that I
did refer to in cross-examination earlier, but the
witness agreed with everything I said, so I think page
-- just page six forty-five (645) would be appropriate.

THE COURT:

20 With maybe the top page.

THE CLERK:

RJR-218.

Me CHERNIAK:

25 Q- At any rate, sir, you'll agree with me that except
perhaps for the omission of the adolescent rebellion,

and misconception of the risks of smoking, your answer in the Roysdon case closely parallels the words in the -- closely parallels what the authors of chapter XVI of the nineteen seventy-nine (1979) report said?

5 A- With those exceptions, yes.

Q- Yes. And you gave evidence in the Roysdon case, the transcript indicates, on December eleventh (11th), nineteen eighty-five (1985)?

A- That's correct.

10 Q- Now, when we turn to chapter XVII of the nineteen seventy-nine (1979) report that we were dealing with at the lunch break, the authors of chapter XVII, unlike the authors of chapter XVI did, in fact, deal with the mass media on the -- as a part of the various topic headings

15 that they were -- that they were dealing with. And we went over those topic headings this morning, the main heading was: "Typical Psycho-Social Influences on the Smoking Decision." And, of course, they also used, as topic headings: "Parental Smoking Habits," "Parental

20 Acceptance of Children Smoking," "Siblings Who Smoke," "Rebellion Against Family Authority," "Peer Pressures," "School Environment," but they considered that a discussion of mass media was something separate from those -- from those items. You're trying to tell us

25 that you think mass media is included in those headings

of peer pressure and the like. The authors of chapter XVII treated it as a separate topic, didn't they?

A- No, I'm not sugges...

Q- No, they didn't. Sir, would you look at the table of contents...

A- If you would allow me to answer...

THE COURT:

Let him give his answer.

A- ...Mr. Cherniak, okay.

This chapter deals with the strategies that have been employed to prevent the initiation of cigarette smoking by adolescents and the mass media paragraphs deal with the use of mass media campaigns to prevent the initiation of tobacco use.

Q- No, no, please, sir. Please, sir.

A- As I understand the two (2) paragraphs, they are discussing whether or not it is possible to use anti-smoking spots to influence the uptake of tobacco by adolescents.

Me CHERNIAK:

Q- Well, let's just analyze this chapter, sir. Let's just look at the table of contents to see whether what you're saying makes any sense at all. Look at the title page of the chapter. Smoking in children and adolescents, psycho-social determinants in prevention strategies?

A- Yes.

Q- So there are two (2) separate topics. Psycho-social determinants, that's determinants meaning why people smoke, and prevention strategies?

5 A- That's correct.

18/0017

Q- Right. And look at the table of contents. Introduction is the first part of the chapter. Current smoking patterns and beliefs is the second part of the chapter. Relevant conceptual models and developmental and social psychology is the third part. The fourth part has the main heading: "Typical psycho-social influences on the smoking decision" -- in other words determinants, right?

10

A- No.

Q- All right, just...

15

A- I mean, if... if...

Q- Just listen to me.

A- I mean, if one reads...

Q- "Typical psycho-social influences on the smoking decision" and then several of them that we've gone over are listed and...

20

A- And the influences that are being discussed and the influences that lead to the initiation, whether it can be effectively used to prevent the initiation of smoking by adolescents.

25

Q- Well, the next line...

A- The discussion in the two (2) paragraphs: "The Mass media", is a discussion of the use of mass media as an effective strategy to block the uptake of tobacco.

Q- All right, let's just go through the table of contents.

5 THE COURT:

Well, don't you think that what's written there will speak for itself? I can read just as well as you can.

Me CHERNIAK:

10 I would have thought so, My Lord. Obviously, the witness doesn't.

THE COURT:

Well, that's for me to evaluate that.

Me CHERNIAK:

Yes, of course. All right.

15 Q- At any rate, when we come to the learned author's discussion of mass media, the study goes on with the passages that I've already read to you, but the conclusion is reached -- or the tentative conclusion on page sixteen (16) is reached:

20 "The effects of messages in other media such as billboards, magazines and displays, need to be more precisely studied."

That's their conclusion, that they really can't tell what the effect of mass media is.

25 A- That's a statement of fact based on the absence of data,

that's correct.

Q- Yes. All right. And then we come to chapter XVIII and the chapter -- and the title of Chapter XVIII is "Psycho-Social Influences on Cigarette Smoking". And I take it that's really not very different than the first part of chapter XVII but...

A- It is -- this covers adults as well as adolescents.

Q- Right.

A- Or predominantly actually focuses on adults.

Q- Whereas chapter XVII predominantly focuses on...

A- Adolescents.

Q- ... adolescents. Okay. But we're still talking about psycho-social influences?

A- That's correct. However, with adults one is talking about psycho-social influences that lead to maintenance or cessation, as opposed to adolescents where one is talking about influences that lead to the initiation of tobacco use.

Q- So to the extent, then, that -- as I understand what you're telling me, that in chapter XVII, the discussion of the media influences is really more directed toward the question of the -- of the effectiveness of anti-smoking media influences? I understand that's what you're telling me?

A- The predominant message or predominant discussion of the

two (2) paragraphs or whatever on the mass media is related to the effect of mass media's ability to influence kids not to take up cigarette smoking, that is the effect of an anti-smoking campaign conducted through the mass media.

Q- Yes, I appreciate that. And can you then show me any place in chapter XVII that is dealing with the psycho-social determinants that make adolescents smoke? Can you show me where there is any direct discussion of the influence of advertising?

A- To my knowledge, there is no direct discussion of advertising specifically in that chapter.

Q- Except dealing with the effectiveness of -- of prevention, prevention campaigns?

A- The conclusion, as I read those two (2) paragraphs and as I understand the document, is that the mass media approach directly at adolescents is of limited value...

Q- So, so far -- so far...

A- ... for prevention of smoking is of limited value.

Q- So far, with respect to chapter XVII and chapter XVIII, there is no direct discussion at all of the influence one way or the other of media advertising on the decision to smoke? So far, am I right?

A- There is no direct discussion of advertising, that's correct.

Q- And chapter XVII though, we do see some discussion of advertising and this is under the heading "Psycho-Social Influences on Cigarette Smoking"?

A- Yes.

5 Q- And am I correct that the author of chapter XVIII was a
Dr. Lynn T. Kozlowski who at that time was the assistant
professor of psychology in the Department of Psychology
at Wesleyan University in Middletown, Connecticut?

10 A- I think that that is true. I'd have to check, but I
assume that that's correct.

Q- And is that the same Lynn T. Kozlowski who gave evidence earlier for the government in this case?

A- I believe so.

Q- Yes. And can we look then at what Dr. Kozlowski said in
his review of the situation for the Surgeon General up
to nineteen seventy-nine (1979)? Would you turn to page
twenty-two (22), please? And the heading is: "Some
General Psycho-Social Influences on Smoking." And maybe
just before we do that we can just look at the contents
to see just what went before that without taking the
time to read it. Would you look at page III of Chapter
XVIII, the contents. And there's a heading:

"Maintenance of Smoking," covers pages V to page XVI and it talks about the various individual factors that affect maintenance to smoking, and would I be -- would I

be correct if I said none of them relate to advertising?

A- I'm uncomfortable with the word "relate." None of them are a direct discussion of the influence of advertising, that's correct.

5 Q- Fair enough. And the next four (4) or five (5) pages deal with the cessation of smoking, so it's not on the topic at all; correct?

A- I'm not sure what your specific topic is, but...

Q- The topic is why people start and continue to smoke.

10 A- Well, I would express the opinion that the advertising, the images of advertising, et cetera, may have some influence on the decision to quit.

Q- Okay. Again, it doesn't look like, from the topic headings, that any of...

15 A- There is no explicit discussion of advertising in those sections as far as I'm aware.

Q- But then we have another heading: "Some General Psycho-Social Influences on Smoking." Starting at page XXII.

20 A- That's correct.

Q- And that's the part we're going to read together now.

A- Right.

Q- Okay. So the first time -- so certainly in Dr. Kozlowski's chapter, he feels that the discussion of the
25 influence of mass media and smoking is worthy of direct

treatment rather than indirect treatment?

Me EVRAIRE:

Objection. I don't think this witness can answer about what was in Dr. Kozlowski's mind.

5 Me CHERNIAK:

I thought that's why he was here.

THE COURT:

Under reserve.

Me CHERNIAK:

10 So...

THE COURT:

Maybe you could say that in a different manner anyways.

Me CHERNIAK:

15 All right. Well, I'll just go on. Some things speak for themselves as you said, My Lord.

THE COURT:

And we all can read.

Me CHERNIAK:

Q- Here's Dr. Kozlowski talking:

20 "There is little persuasive empirical research available on the effects of television advertising or its ban on cigarette sales or on recruitment to the ranks of smoking. Bans on television advertising for cigarettes in
25 several countries, including the United

Kingdom, Denmark, Ireland, New Zealand and Italy seem to have had almost no effect on per capita cigarette consumption."

5 So, in other words, the best literature up until nineteen seventy-nine (1979), or the best studies up till nineteen seventy-nine (1979), came to that conclusion?

A- No.

Q- Right?

10 A- That my...

Q- No. No, that's wrong?

A- My interpretation of that English language is that Dr. Kozlowski was saying what was quite correct, which is that there is very little evidence available in the literature on this issue. The few pieces of evidence that are available include the change in per capita consumption in a couple of countries. That evidence does not suggest an influence of advertising on per capita consumption. But as I read that first sentence, 15 what he is saying is that there simply is not much evidence available.

Q- Well, he's not saying there isn't much evidence available, he's saying in the sentence I just read, bans on television advertising for cigarettes in several 20 countries, including the United Kingdom, Denmark, 25

Ireland, New Zealand and Italy, seem to have had almost no effect on per capita cigarette consumption?

A- That's correct. The first sentence says that there is very little evidence available. The second sentence addresses one of the small pieces of evidence that was available, which is the relationship between per capita consumption in a country and the presence or absence of an advertising ban.

THE COURT:

10 And if I read it myself, what I read is that there is
little persuasive empirical research available. That's
what I read.

Me CHERNIAK:

15 Yes. That's what it says, sir. Hard to read it any other way.

A- And I mean, I interpret that to mean...

THE COURT:

I just read what's written there.

A- That's right.

20 Me CHERNIAK:

Q- Then Dr. Kozlowski goes on to say:

A highly technical econometric analysis has estimated that the 1965 ban on television advertising in the United Kingdom produced a statistically insignificant fall of 3% in

cigarette consumption."

So I take it that would be in part the reason for his use of the adjective, "and little persuasive evidence," because a statistically insignificant fall wouldn't be very persuasive, would it?

A- I think that that piece of evidence is covered by that term.

Q- Yes.

A- But I think he was applying that to the broad issue and that there was very little evidence at all available on the topic.

Q- "In communist countries ..."

-- he goes on to say --

"... smoking is prevalent without any --

without advertising of any sort to support it."

A- That's correct.

Q- That's still true, isn't it?

A- That is still true.

Q- "4 years after the 1970 ban on advertising in the United States, there was little indication that this mass medium had a major influence on cigarette consumption. An econometric analysis by Warner in 1977 suggested, however, that the sustained anti-smoking activities,

including mass media, that have been conducted since 1964 may have prevented consumption of tobacco from rising even further than it already has."

5 So it seemed to work one way, but not the other way, as best he could tell.

A- And what he presented was that there is evidence, when looked at in one format, for not much of an effect. When looked at in a second format, there was evidence that
10 there was some effect, and again what he's saying is that there's very limited evidence available and he has attempted to discuss what's available.

Q- Yes. And then if we look at about the middle of the next paragraph, Dr. Kozlowski, after citing a study that
15 was -- that dealt with the period nineteen twenty-two (1922) through nineteen fifty-two (1952), he then says, about the middle of the paragraph:

 "As the cigarette industry has asserted, the major action of cigarette advertising now
20 seems to be to shift brand preferences, to alter market share for a particular brand."
It's clear that Dr. Kozlowski agreed with that position, isn't it?

A- Well, I think that what he is saying is that in a stable
25 market, that is one where you're not seeing a rapid

increase in the fraction of the population of smoking, that the predominant effect of advertising is to switch which brand of cigarettes you smoke.

5 Q- Precisely. And, of course, we're in exactly that kind of market now. We're not seeing much -- as a matter of fact, from the figures we looked at this morning, it's clear that the percentage of the population that smokes is not stable, it's going down.

A- That's correct.

10 Q- Correct?

A- That's correct.

Q- And therefore to the extent that we're still in that kind of a market, a stable market or one where the number of smokers is actually decreasing, the proposition that Dr. Kozlowski accepts is that the major action of -- as the cigarette industry has asserted, the major action of cigarette advertising now seems to be to shift brand preferences to alter market shares for a particular brand?

20 A- That's correct.

Q- And that was the view that the Surgeon General accepted in nineteen seventy-nine (1979)?

A- That's correct. There are two (2) intents of advertising, one (1) is to increase the number of people using a product and the second is to increase the

fraction of the market that uses your product.

What Dr. Kozlowski is saying and what I think there is substantial evidence to support, is that the dominant or the larger of those two effects is indeed the shifting between brands. That does not exclude some effect on increasing the size of the market.

Q- And it is far more true now, in nineteen ninety (1990), eleven (11) years after the nineteen seventy-nine (1979) Surgeon General's report, it's been demonstrated that the share -- that the percentage of persons smoking is going down at a rapid clip, far more so than in nineteen seventy-nine (1979), isn't that so?

A- It is true that the prevalence is going down. I'm not sure what you're asking me to clarify now.

Q- Well, to the extent that this statement was true in nineteen seventy-nine (1979), in the -- with the rate of growth that cigarette smoking had at that time, the rate of growth is a negative rate of growth now.

A- That's correct.

Q- And so to the extent that in nineteen ninety (1990) the advertising of -- and in the period nineteen seventy-nine (1979) to nineteen ninety (1990), to the extent that the effect of advertising was to increase the number -- the percentage of people smoking, it has been a dismal failure; right?

A- No, that is not true. What Dr. Kozlowski is saying is that in a stable market, one in which there is no uptake or cessation of smoking, that the predominant effect would be on brand preference. In a market however, like
5 the current market, where you have a large number of -- or a large fraction of the population who is contemplating quitting and attempting to quit, if there is an effect of advertising on adolescent behaviour -- and I believe there is -- then that effect influences
10 the uptake of tobacco and is not simply an influence on the brand preference.

Q- Dr. Burns...

A- So...

Q- Sorry. Go ahead

15 A- So if you're asking me to say that this declining market is one where advertising can only have an effect on brand preference, I cannot agree with that statement, because about fifteen (15%) to twenty percent (20%) of our young people are still taking up cigarette smoking
20 and it is my belief that advertising influences that phenomenon and that is not simply an effect on the brand of tobacco that they choose, it's also an effect on whether they choose to smoke.

Q- Save, Dr. Burns, I didn't ask you your opinion. Your
25 opinion on that issue is totally irrelevant to me

because you have no expertise in that area. You've not been qualified for any expertise in that area.

A- I'm doing the best to answer the questions as I can.

Q- Sure. Well, one of the things you said was that this is what Dr. Kozlowski says. Now, you tell me where Dr. Kozlowski talks at all about the influence of advertising on initiation of smoking by adolescents. Where, sir, in chapter XVIII or elsewhere, does Dr. Kozlowski make any such statements in the nineteen seventy-nine (1979) Surgeon General's report?

A- Dr. Kozlowski's task in this chapter was to discuss the influences on adults. He does indeed discuss the influences on adults and his discussion is largely restricted to them.

Q- But...

A- It is not appropriate to discuss initiation in adults, because initiation of cigarette smoking is largely complete by the time one becomes an adult, and therefore, if one is talking about adult behaviour, one deals with the issue of whether or not advertising and other influences influence the decision to quit smoking rather than the decision to start smoking.

Q- My Lord, I'd like to have the witness' answer read back to him, because he definitely said...

THE COURT:

Well...

Me CHERNIAK:

...he told me that Dr. Kozlowski was talking about the initiation of smoking by young people in this chapter. I don't see it and -- but this witness said so.

THE COURT:

Well, again, I must say that I can read just as well as anybody else.

10	Me CHERNIAK:
----	--------------

Well, it's a question of whether this witness has any credibility at all, making a statement such as that, sir.

Me EVRAIRE:

15 My Lord, I've not objected before, my friend's in
cross-examination and of course that gives him freer
rein, but I'm really confused myself as to where we're
going. My friend doesn't want this opinion -- this
witness' opinion, he wants him to interpret that which
20 others have written. I fail to see how that can assist
the Court in any way, especially as the text is before
Your Lordship, already in evidence.

Me CHERNIAK:

25 You see, My Lord, the Crown called this witness to interpret for you the Surgeon General's reports. That's

why he's been cross-examined in this fashion on the interpretation of the Surgeon General's reports, not his own opinion. His own opinion, he's not qualified to give an opinion in this area. I wouldn't dream of asking him for one.

THE COURT:

Well, be that as it may, proceed. The more complex your questions are, the more complex the answer is going to be.

Me CHERNIAK:

Well, apparently.

Q- You'll agree with me, sir, nowhere in chapter XVIII does Dr. Kozlowski mention the initiation of cigarette smoking by adolescents, does he?

A- He does not. That is not the focus of that chapter.

Q- Is it correct that he doesn't mention it, sir?

A- It is...

Q- Focus or not?

A- As I said, it is correct that he does not mention it and it is not the focus of that chapter.

Q- Yes. Anyway, sir, the opinion that the Surgeon General was prepared to accept and did accept in nineteen seventy-nine (1979), when he accepted the publication of this chapter as a part of the nineteen seventy-nine (1979) report, was that as the cigarette industry has

asserted:

"A major action of cigarette advertising now
seems to be to shift brand preferences to
alter market shares for a particular brand"

5 Yes?

A- The text is as you have read it and the Surgeon
General's report was as you have read it. I mean...

Q- And there is no Surgeon General's report since that time
that has challenged that conclusion, is there?

10 A- I'm not quite sure that that's true, but...

Q- Now is your time to point it out to us, sir.

A- My impression is that there was some discussion of the
influences of media in the eighty-nine ('89) report.

Q- All right, Doctor. One other matter that I want to ask
15 you about...

A- Is that in this report or...

Q- I'm sorry?

A- Is that in this or should I give this...

Q- You can do whatever you want with that. I'm going on to
20 another topic.

Me BAKER:

Q- Don't throw it at him.

A- I'm not prone to violence.

THE COURT:

25 It's funny how we interpret words.

Me CHERNIAK:

Q- Now, sir, I just want to ask you a couple of things
about -- about the effect of smoking and -- I'm sorry --
about the relationship between smoking and
5 cardiovascular disease, which is an area that you have
written on. Am I -- would you agree with the
proposition that whatever risk there is of coronary
heart disease from tobacco use, that the risk declines
dramatically with the cessation of cigarette smoking?
10 Would you agree with that proposition?

A- I agree -- well, yes, I agree with that proposition.

Q- Okay. And would you agree with it...

A- I would not caveat it with the statement of whatever
risk exists. I mean, there is a risk that exists but it
15 does indeed decline with cessation of smoking, that's
correct.

Q- We'll let other people tell us what the risk is. I'm
not asking you what the risk is. It's not really your
field. I want to know whether you agree and have in
20 fact written: the risk of death from coronary heart
disease by tobacco use declines dramatically with the
cessation of cigarette smoking?

A- That's correct. I have written that and that is true.

Q- And have you written this:

25 "By 5 years after the last cigarette, the risk

in those who had smoked less than 1 pack per day approximates the risk in lifelong non-smokers."

A- Yes.

5 Q- And even for those who have smoked more than one (1) pack a day, ceasing for five (5) years, a small residual risk of cardiovascu... of cardiac heart disease may persist?

A- That's correct.

10 Q- And that's still true?

A- That's still true.

Q- All those propositions are still true? Yes?

A- All of the statements that you have read I would still agree with, if you are referring to the cardiovascular statements, yes.

15 Q- That's what I'm referring to.

A- Okay.

Q- The office of the Surgeon General of the United States has -- for the last two (2) incumbents, at least -- have been occupied by persons who became known as spokesmen for anti-smoking campaigns?

A- I don't believe the current Surgeon General yet has much visibility on any issue, particularly the issue of smoking, but certainly Dr. Koop, who was her predecessor, was very visible on that issue, as was Dr.

Richmond, the prior Surgeon General.

Q- And, Doctor, with -- the current Surgeon General is Mr.
-- is it Mr. or Dr. Sullivan?

A- No, Dr. Sullivan is the Secretary of Health and Human
5 Services.

Q- I'm sorry, who is the current...

A- Actually, I can't remember the name. She is a woman who
came from the drug and alcohol field, I think, to become
Surgeon General, but...

10 Q- I see.

A- ... I don't have her name with me.

Q- And is it fair to say that because of the activities of
the last, I guess the last two (2) incumbents before the
present one, that that would be seen to be one of the --
15 qualifications is probably the wrong word -- the
attributes of a Surgeon General, that one would be
well-known in the -- in the -- from the campaign against
the tobacco use?

A- I don't think that's true. I think that neither the
20 current Surgeon General, nor Dr. Koop when he was
appointed, had substantive experience with the tobacco
issue prior to their involvement as Surgeon General.

Q- Right, but would it be -- would it be an attribute that
would be useful in one who aspired to become Surgeon
25 General or not?

Me EVRAIRE:

Objection. That's not a question for this witness to answer, that's a question for the President of the United States.

5 A- The...

Q- There's an objection on the table, Doctor.

A- I'm sorry.

Me CHERNIAK:

10 This witness has never had any difficulty answering any other question I asked him, I think he could answer that one.

THE COURT:

I don't think he's qualified to answer that one.

Me CHERNIAK:

15 Q- Well, let me ask you this, sir. Your name has been mentioned as a potential candidate for Surgeon General, hasn't it?

A- Not by the people who make the appointment.

Q- Well, speculation has revolved around your name as a potential candidate, has it not? Is that so or not?

20 A- All right. There has been, in the single article that you quoted earlier, mention of that. I don't think that anybody who is seriously knowledgeable of the politics of Washington has surfaced my name as a candidate for
25 Surgeon General.

Q- Yet.

A- Life goes on, but I do not see that in my future, no.

THE COURT:

Q- There's never too much of too good things.

5 A- I'm not sure that taking a federal position is obviously
a good thing.

Q- I don't know.

Me EVRAIRE:

That's not so bad.

10 Me BAKER:

Well...

Me EVRAIRE:

My Lord, I'll be brief with Dr. Burns, but...

THE COURT:

15 Well, maybe we have some questions.

Me EVRAIRE:

Oh, I'm sorry.

THE COURT:

I don't know, but...

20 Me DUNBERRY:

I have no further questions.

Me EVRAIRE:

25 My apologies for being presumptuous to my friend. I
wonder if we might have the afternoon break now, just so
that I can tighten up my questions.

THE COURT:

Yes.

Me EVRAIRE:

We can have a short break, if you wish. Fine.

5 THE COURT:

And short re-examination?

Me EVRAIRE:

Very short, yes.

THE COURT:

10 Okay.

SHORT RECESS

Me EVRAIRE:

15 My Lord, just before we begin, if I might give you that
typewritten reference to the summaries and conclusions
from the different Surgeon General's reports, which I
promised this morning.

THE COURT:

20 M'hm.

Me EVRAIRE:

Est-ce que vous désirez l'insérer dans une des pièces?

THE COURT:

25 Would you mind a lot if we give it an AG number?

Me EVRAIRE:

Whatever you'd like to call it, I don't care.

Well, My Lord, actually we have AG-146 A, B, and C,
maybe we can mark this as AG...

5 THE COURT:

No, we have AG-146 up to W.

Me EVRAIRE:

Oh, you're right. So let's mark this "X". I get your
drift now.

10 THE CLERK:

AG-146-X.

RE-EXAMINATION BY Me PAUL EVRAIRE,

On behalf of Respondent:

15 Q- Well, Dr. Burns, my friend has questioned you
extensively on the nineteen seventy-nine (1979) Surgeon
General's report.

Let's come back to the future, as they say, a
little bit, and look, My Lord, if you will at the
20 nineteen eighty-nine (1989) report.

And if you refer, Dr. Burns, to page two sixty-one
(261), two sixty-two (262) are the contents in this part
of the report and you'll note that at page three
twenty-nine (329) is shown on the overleaf changes in
25 knowledge about the determinants of smoking behaviour,

which starts at three twenty-nine (329), and I'd like you to focus, if you will, on the summary at the end of that, at page three thirty-nine (339), which reads as ...

5 Perhaps, Your Lordship, I'm in your hands -- it's fairly brief, maybe I could just read it into the record now. And it says:

10 "The increased understanding of the multiple and interacting determinants of the development of smoking and of the relation of these determinants to the stages of development of smoking is a reflection of progress over the last 25 years. The delineation of stages from onset to regular use has been an especially influential development."

15 Reference to a Figure II.

THE COURT:

 Where are you reading?

20 Me EVRAIRE:

 I'm sorry. Three thirty-nine (339).

THE COURT:

 Oh!

Me EVRAIRE:

25 Bottom right-hand side.

THE COURT:

I was reading -- trying to find it out in three
twenty-nine (329). Summary. Okay.

Me EVRAIRE:

5 Okay. And three (3) sentences in, My Lord, it
continues:

"The development of the addictive process in
teenagers has recently become better
appreciated and understood."

10 And there's a reference to a nineteen eighty-four (1984)
study. It goes on:

"While information about the long-term disease
consequences of smoking has an important role
in adolescent smoking initiation, awareness of
15 the short-term health consequences and the
influence of peers and advertising are now
seen as more critical for adolescent
decision-making. The effects of peers and
family are both supported. Cigarette
20 marketing appears to target teenagers despite
the cigarette companies' reported policy
efforts to restrict such advertising."

Dr. Burns, was that the opinion of the Surgeon General
in nineteen eighty-nine (1989) and does it continue to
25 so be?

A- Yes, it is. And it does continue to so be.

Q- Thank you. And lastly I refer you and the Court to page
four sixty-one (461) and four sixty-three (463). You
expressed the belief that there was some reference in
the nineteen eighty-nine (1989) report to the question
of tobacco advertising and promotion. Can you confirm
that indeed the index, which is then supported by the
text, does in fact refer to tobacco advertising and
promotion?

A- Yes, it does. It reads: "Restriction on Tobacco
Advertising and Promotion." The next heading is:
"Effect of Tobacco Advertising and Promotion," both on
page four ninety-six (496).

Q- Thank you. My Lord, those are all my questions for Dr.
Burns.

THE COURT:

Well, thank you, Dr. Burns, for the second time.

A- It was a great pleasure to come back to Montreal in a --
weather where I could appreciate your fair city.

Q- Now, it's sunny outside, so you'll be able to enjoy it
more.

A- Thank you.

AND FURTHER DEPONENT SAITH NOT

Me EVRAIRE:

Now, we'll resume with Dr. Liston tomorrow at ten
o'clock (10H00), My Lord.

THE COURT:

5 Tomorrow, sure. Who is following Dr. Liston?

Me EVRAIRE:

Dr. Liston...

THE COURT:

Megarry, that's the last one.

10 Me BAKER:

Jeudi, le vingt-et-un (21), Votre Seigneurie.

THE COURT:

We still have two (2) days with Dr. Liston?

Me EVRAIRE:

15 Well, I'm not sure if my friends will take the two (2)
days, but...

THE COURT:

They have two (2) days scheduled.

Me EVRAIRE:

20 ...we have two (2) days available, let's put it that
way.

THE COURT:

Okay.

25 ADJOURNMENT

CANADA
PROVINCE DE QUÉBEC
DISTRICT DE MONTRÉAL

COUR SUPÉRIEURE

SOUS LA PRÉSIDENCE DE L'HONORABLE JUGE [REDACTED] BOT, J.C.S.

RJR-MACDONALD INC.
Requérante

IMPERIAL TOBACCO LIMITÉE
Requérante

c.

c.

LE PROCUREUR GÉNÉRAL DU
CANADA
Intimé

LE PROCUREUR GÉNÉRAL DU
CANADA
Intimé

19 juin 1990 - Vol. 70

COMPARUTIONS :

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RJR-MACDONALD INC.

Pour la requérante
IMPERIAL TOBACCO LIMITÉE

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I N D E XPages

PROOF OF RESPONDENT (Contd)

DR. ALBERT J. LISTON

Cross-examination (Me Irving). 10583

Cross-examination (Me Potter). 10655

LIST OF EXHIBITS

	<u>Pages</u>
AG-259-A Advertising Management Third Edition by David A. Aaker and John G. Myers, pages 52 to 55.	10578
AG-259-B Marketing Contemporary Concepts and Practices by William F. Schoell and Thomas T. Ivy, page 209	10578
AG-259-C Marketing Contemporary Concepts and Practices from William F. Schoell and Joseph P. Guiltinan, page 249	10578
AG-259-D Principles of Marketing, Fourth Edition of Philip Kotler and Gary Armstrong, page 224.	10578
RJR-219 Memorandum dated April 8, 1986, by Dr. A.J. Liston	10590
RJR-220 Document: Tobacco Consumption in Various Countries, edited by P.N. Lee Research Paper VI, Fourteenth Edition, Tobacco Research Council, London 1975.	10631
RJR-221 En liasse, memorandum dated June 9, 1986: "The Meaning of The Term Addiction," with attachments	10639
RJR-222 En liasse, Letter dated September 28, 1987 addressed to William Neville of the Canadian Tobacco Manufacturer's Council by Dr. A.J. Liston, with attachments	10645
RJR-223 En liasse, memo dated December 13, 1988 from A.J. Liston to Dr. Maureen Law, with attachments	10651
ITL-55 Document, pages 5698, 5700 to 5702, "Request for Briefing Information." Title page.	10668
ITL-56 Recommendations regarding sale and labelling by Dr. A. Liston, page 5699	10668

LIST OF UNDERTAKINGSPages

- | | | |
|----|---|-------|
| 1. | Undertaking by the Respondent's witness to check on whether they could continue to include tobacco advertisements in their publications | 10650 |
| 2. | Undertaking by the Respondent: to furnish letters sent to the Globe and the Star with respect to the compliance to the Tobacco Control Act. | 10711 |

LIST OF OBJECTIONS

	<u>Pages</u>
1. Objection.	10684
2. Objection.	10699
3. Objection.	10714

In the year of Our Lord nineteen hundred and ninety (1990),
on this nineteenth (19th) day of the month of June,
PERSONALLY CAME AND APPEARED:

5 Me COLIN K. IRVING:

Pour la requérante, RJR-Macdonald, Colin Irving et
Georges Thibaudeau.

Me PAUL EVRAIRE:

Votre Seigneurie, je me demande si on devrait peut-être
10 attendre un représentant d'Imperial ou bien est-ce que
vous pourriez ordonner qu'on procède tandis que...

LA COUR:

On peut peut-être s'identifier pour commencer.

Me EVRAIRE:

15 Ah, ça aiderait.

Me ROGER E. BAKER, Q.C.:

Slow. Lentement.

Me SIMON V. POTTER:

Excusez-moi, Votre Seigneurie.

20 Me EVRAIRE:

It's your turn to identify yourself, right now.

Me POTTER:

Et le retardataire, Simon Potter.

Me EVRAIRE:

25 Et pour le Procureur général du Canada, maîtres Roger

Baker, Claude Joyal, Lorianne Weston, Lise Tremblay et
Paul Evraire.

1/0060

THE COURT:

Gentlemen, I would suggest today we call it a short day
because of this -- of the visit of Mr. Mandela, because
otherwise we won't be able to get out of here at four
thirty (16H30).

Me BAKER:

Mr. Irving was probably going to tell you that he might
well be finished by noon.

THE COURT:

Oh, that'll be great!

Me IRVING:

My Lord, I think, having gone through my notes again,
that I don't expect to take the whole morning. I
understand Mr. Potter's is fairly brief as well. We may
well finish by lunchtime.

THE COURT:

Oh, great.

Me IRVING:

If not, certainly early afternoon.

Me BAKER:

And I have even better news yet for you, My Lord. You
will not be sitting on Friday. We have reached an
agreement in respect of Dr. Cohen, so I would like to

file four (4) articles in connection with his undertaking. The next AG number is 259. Je peux les produire, si vous voulez, Votre Seigneurie, soit en liasse ou séparément.

5 LA COUR:

Peut-être A, B, C, D. A, B, C.

Me BAKER:

O.k., d'accord. "Advertising Management", Aaker and Myers, 259-A. "Marketing Contemporary Concepts and Practices", William F. Schoell and Thomas T. Ivy.
10 "Marketing Contemporary Concepts and Practices", Schoell and Guiltinan, 259-C. And "Principles of Marketing", fourth edition, Kotler and Armstrong, 259-D. Mr. Potter, through inadvertence I do not -- as
15 you noticed, the series of questions and answers from Dr. Cohen were in respect of RJR -- I do have a copy for you at the office of these four (4) articles which I will...

Me POTTER:

20 That's fine.

Me IRVING:

My Lord, I think the record should show two (2) things. First, these are not articles, they are extracts from textbooks and they relate to a question of mine in
25 cross-examination to Dr. Cohen and are being put in, as

I understand it, as a response to that question. It has also been agreed that a further extract from a text which Dr. Cohen referred to in his report will be filed. It is coming from Mr. Thibaudeau's office and it won't be here until the break this morning. My suggestion was that they should all be filed together, for the convenience of the Court. Mr. Baker wishes to have those filed as Attorney General exhibits, so the additional extract will have to be filed as an RJR exhibit, but for convenience I would suggest they all be kept together because they all relate to the same subject.

Me EVRAIRE:

And perhaps a last bit of housekeeping. My friends -- my friend rather, Mr. Irving, last week asked for consumption data for Finland and Norway for the years prior to nineteen fifty (1950) from Dr. Liston. In detailing the answer to this, I note that one of these documents is already available to my friend in AG-69, and I have an extract of it for the Court and for my friends. So indeed it was already in the record, My Lord. I won't interpret it but if you look at this Table 13 from the document, you'll see from the period nineteen twenty-three (1923) right through nineteen eighty-three (1983) that Finland and Norway figure

prominently.

And if you note, My Lord, at the bottom of that --
I apologize, it's badly photocopied -- but there is
reference to an article or a text by P.N. Lee, nineteen
5 seventy-five (1975), unless otherwise specified, and I
have that document as well to file. Actually, I think
it should be filed by my friend. It's really his
exhibit. I note it's from the Tobacco Research Council
in London, which is a tobacco industry council and
10 certainly my friends might have had access to that. I
don't know why they needed the document to be provided
by the Crown. In any event, I'll give that to the Court
and to my friends and as I say, I believe that should be
marked as an RJR exhibit, not an AG exhibit.

15 Me IRVING:

I'd like to look at the document first.

Me EVRAIRE:

Well, perhaps we can hold off on that one until my
friend...

20 Me IRVING:

Yes.

Me EVRAIRE:

... at the break perhaps has looked at it.

Me IRVING:

25 Yes.

THE COURT:

Do I understand, Maître Evraire, that these were the figures available to the department prior to nineteen fifty (1950)?

5 Me EVRAIRE:

Yes, that's correct. And in my submission this satisfies the undertaking made through Dr. Liston during his testimony last Thursday.

Me IRVING:

10 Well, I will deal with these documents with Dr. Liston, My Lord.

Me EVRAIRE:

Well, I can tell you, My Lord, and my friend, that Dr. Liston has not reviewed these documents, nor is he in a position to deal with them, so my friend will have to take them on their face value.

Me IRVING:

We shall see, My Lord.

Me EVRAIRE:

20 We shall see.

THE COURT:

So let's see.

Me BAKER:

We shall.

25

Me IRVING:

The point wasn't whether we had access to data, My Lord,
the question was what was in the possession of the
government of Canada, as I think will become evident to
my friend as we go on.

THE COURT:

Well, anyways, are we ready to go with Dr. Liston?

Me IRVING:

Yes.

Me EVRAIRE:

Yes.

THE COURT:

Okay.

Me EVRAIRE:

He's your witness.

Me IRVING:

He's your witness, but I'm cross-examining him.

In the year of Our Lord nineteen hundred and ninety (1990),
on this nineteenth (19th) day of the month of June,
PERSONALLY CAME AND APPEARED:

5 ALBERT J. LISTON, fifty-seven (57) years of age, residing at
[DELETED]

WHO, after having been duly sworn on the Holy Bible, doth
depose and say as follows:

10

CROSS-EXAMINATION BY Me COLIN K. IRVING
on behalf of Petitioner, RJR-Macdonald Inc.

Q- Dr. Liston, I'd like to come back with you to the first
meeting you had with Mr. Epp which you told us was in
15 nineteen eighty-four (1984), and if I caught it
correctly, you said that at that very first meeting Mr.
Epp indicated that tobacco for him was going to be a
priority; do you recall that...

A- Yes, sir.

20 Q- ...evidence from last week? Did Mr. Epp tell you at
that first meeting what his plan was in respect of
tobacco?

A- No, there were no details discussed in an operational
sense. The minister was indicating at that time that it
25 was an area that he wanted to have a fair amount of

activity.

Q- M'hm. And as far as you could tell from your position, Dr. Liston, did that continue to be a priority of Mr. Epp's as time went on?

5 A- Yes, sir.

Q- Yes. Did you have meetings with him at regular intervals to discuss the tobacco question?

A- Yes, sir. Not regular in the sense of planned in a repetitive time, but there were a number of meetings with him.

10 Q- So I'm looking particularly now at the period between nineteen eighty-four (1984), when he came into office, and let's say the spring of nineteen eighty-six (1986). Would it be fair to say that from time to time you would
15 meet with him in that period?

A- Yes, sir.

Q- To review the tobacco issues?

A- Yes, sir.

Q- Yes. And he would keep you advised, would he, on what he had in mind?

20 A- Yes, sir.

Q- And you would keep him advised of the views of the department, would you?

A- We would in fact have discussions in terms of policy options and then progress on the file in general terms.

25

Q- If he wanted to make a policy statement in public, Dr. Liston, would he consult with you before doing so?

A- I'm not certain I would use the term "consult." As public servants we support the minister in his policy priorities, so he would have contact with us for purposes of our supplying the supporting information that he wanted.

Q- But when you give information to the minister, which is based on research done within the department, Dr. Liston, you're not just telling him what he wants to hear, are you? You're telling him the honest view of your department?

A- Yes.

Q- Yes. And you continued to do that, did you, in that period nineteen eighty-four (1984) to say the spring of eighty-six ('86)?

A- Yes, sir.

Q- Yes. Dr. Liston, in May of nineteen eighty-six (1986), Mr. Epp, in speaking in the House of Commons, made a statement I'd like to show you. It is Exhibit ITL-27, Tab 26, and it is an extract from Hansard.

THE COURT:

Where are you reading from?

Me IRVING:

I'm reading, My Lord, from the bottom right-hand column.

And Mr. Epp says this in response to a question from Miss Lynn McDonald.

"What I am doing is sitting down with the tobacco industry to see whether it will take some action. As I have indicated to the Honourable Member, I will wait until the end of June.

Additionally, what I am saying to her and to the country, is that the government will then consider what action to take. I am saying to her very directly that if she is an expert in this field at all and if she has looked at the effect that the banning of advertising has on reducing the number of smokers, then she will know that it is painfully few. There are other steps which one has to take. It might be good visuals, and she often deals with visuals rather than actualities, I deal with actualities."

Q- Now, Dr. Liston, did you consult with or were you consulted by the minister prior to his making that statement in the House of Commons in May of nineteen eighty-six (1986)?

A- I cannot give you an answer one way or another, sir, I don't know.

Q- I see. Do you recall having met with the minister at all at about that time, Dr. Liston?

A- I have no recollection of specific dates when we met because, as indicated previously, there were a fair number of meetings with the minister. Whether or not they were directly for that answer, I would doubt that it would be for those answers.

Q- M'hm.

As far as you were aware, Dr. Liston -- I'm sorry, I'll withdraw that. Did you know about that speech in the House of Commons at the time, Dr. Liston?

A- I would not qualify that as a speech. That is more an answer to questions during the question period, if I'm not mistaken.

Q- All right. Then with that qualification, were you aware of it at the time, Dr. Liston?

A- No, I -- question period goes on and the minister may be called upon to answer questions that arise in the House ...

Q- M'hm.

A- ...and he would do so from his briefing book, from his notes that he might have with him.

Q- M'hm. But you knew that was his view, didn't you?

A- I'm sorry, would you mind...

Q- Well, you knew that the view which I've just read to

you, which he expressed on his own behalf in the House, was his view, didn't you?

5 A- I knew that he had concerns over the tobacco file and what steps would be necessary to develop a -- call it a joint program or a more comprehensive program.

Q- But you knew that he thought banning advertising would be good visuals but that it wasn't actuality, didn't you?

10 A- I have no comment on his view in that sense because he never expressed it to me in those terms.

Q- All right. You have no reason to believe, have you, Dr. Liston, that when he said that in the House of Commons, he didn't mean it?

A- No, I have...

15 Q- No. I want to show you a memorandum of April, nineteen eighty-six (1986), Dr. Liston, just a month or two prior to the statement in the House. May I ask you first if you would just read it through and confirm to us that that is a memorandum which you wrote?

20 A- Yes, sir, it is.

Q- You say in the second paragraph:

"Although it was the eleventh hour, it was my view that the minister would most probably be interested in discussing initiatives that the tobacco manufacturers -- which ..."

25

-- I'm sorry --

"... the tobacco manufacturers would be prepared to undertake to amend and strengthen the current voluntary procedures."

5 Did you write that, Dr. Liston, as a result of consultation with the minister?

A- During the course of the meeting, the prior meeting, the minister had indicated to the members of the C.T.M.C. that if they wished to have further discussions, that they could contact me for that purpose ...

10 Q- M'hm.

A- ... and they had done so.

Q- M'hm. Would you say it was your view that what the minister would be interested in was amendments to the current voluntary procedure? I take it when you wrote that, you knew that to be true from contact with the minister?

15 A- The minister was seized with the file and what options were available to him and this was one of the parameters that was being explored.

Q- I know that, Mr. Liston. That's not quite my question. You say that it was your view and then you go on to give your view of what the minister would want to do. I'm simply asking you did you get that view of the minister's position from the minister? I mean, you

25

didn't make this up?

A- No. That view that the discussion of the forms of
voluntary control was part of the dialogue that had been
initiated by the minister with the tobacco industry and
I was mandated, as it were, to pursue that question with
the tobacco industry and I was responding to them here,
in this paragraph, indicating to the minister or
indicating that there was still interest in whether or
not voluntary code could be strengthened.

Q- And is it your evidence to the Court, Dr. Liston, that
in that period which, may I remind you, is just a few
weeks before the statement in the House of Commons in
which the minister said that banning advertising would
be nothing but visuals, is it your evidence that there
was no discussion with him about the subject of reality
versus visuals?

A- I had no discussions with him of that type, sir.

Q- Could I have this memorandum filed, marked, please, as
Exhibit RJR...

THE CLERK:

219.

THE COURT:

I'm sorry, I didn't get the number.

Me IRVING:

219, My Lord.

Q- Now, Dr. Liston, earlier in your evidence you said that your department had developed a plan to ban advertising. I'd like to look with you, please, at a series of exhibits covering the period between the statement I just read to you and the introduction of Bill C-51 and see if we can just clarify this issue of when a plan was developed. I want to show you first Exhibit RJR-48. RJR-48 is a document entitled "Briefing for Minister", Dr. Liston.

10 A- M'hm.

Q- Have you seen that document before?

A- I may have, yes. There are a number of briefings that go forward and this looks like a briefing note, sir.

Q- M'hm.

15 A- Normally, they would go through my office. Unless I happened to be absent from the office, it would have gone through me.

Q- M'hm. Now, it appears that this particular briefing was prepared by Mr. Collishaw, as we see. In the ordinary course, would this kind of briefing document intended for the minister, prepared by Mr. Collishaw, go to you for your approval before it went on?

20 A- Yes, sir.

Q- Yes. So may we take it, Dr. Liston, that in the ordinary course then, Exhibit RJR-48, which was prepared

25

by Mr. Collishaw, would have been approved by you before it went on to the minister?

A- Yes, sir.

Q- Now, unless I'm misreading the document, Dr. Liston, the position to be taken here seems to be that an advertising ban would be essentially symbolic. Do you see that in the second paragraph under "Relevant Factors"?

A- I quarrel only with the use of the term symbolic. It does state that no unequivocal evidence.

Q- It does say: "its value would appear to be essentially symbolic..." does it not?

A- I would not necessarily share or express it in that way.

Q- No, but...

A- But yes, the document went through my office, it was approved.

Q- M'hm.

A- If I may, to expand on my answer, these are briefing notes that are prepared for the minister in the eventuality that certain select questions are asked.

Q- M'hm.

A- And they do not of themselves constitute, shall we say, the plans for the tobacco program. They are meant to deal with a specific question during question period.

Q- Are they meant to express the true and honest view of

the department, Dr. Liston, or are they meant to demonstrate something different?

A- Well, they are certainly an honest view. But they are not a comprehensive answer. They are dealing with one segment only.

Q- But when I see in a briefing document, prepared by Mr. Collishaw and approved by you, an expression of view, for example, on the effect of an advertising ban, I can take it, can I not, that that was the honest view of the department at the time?

A- Yes, sir.

Q- Yes. In the first paragraph under "Relevant Factors," Dr. Liston, there is a reference to an opinion from the Department of Justice dated August thirteenth (13th), nineteen eighty-five (1985).

Do you recall having ever seen that opinion letter from the Department of Justice?

A- Yes, sir, I remember seeing that letter.

Q- M'hm. So you would agree with me, Dr. Liston, that at least as of November seventh (7th), nineteen eighty-six (1986), the advice from the Department to the minister in respect of the value of an advertising ban is reflected in the document which we are now looking at, RJR-48?

A- I'm sorry, sir, I lost the first part of your...

Q- It wasn't a very well phrased question, Dr. Liston, and I don't think it's in fact even a necessary question, so we'll just move on.

A- Okay.

5 Q- If you have that book...

Me BAKER:

It's much better phrased now.

Me IRVING:

Q- Yes. If you would turn back to Tab 46 of that book, Dr. Liston, you now have before you Exhibit RJR-46, which is another briefing document for the minister, this time dated December eighteenth (18th), nineteen eighty-six (1986). In short, a -- in short, a month or so after RJR-48.

15 Would you first glance through that, Dr. Liston, and tell the Court whether you have seen it before.

A- My answer is as in the prior case, yes, this would have normally come through my office.

Q- Yes. So, Dr. Liston, just so the record will be clear about this exhibit, here again we have a briefing document prepared by Mr. Collishaw, which in the ordinary course would have come for approval to you before it went on to the minister?

A- Yes, sir.

25 Q- M'hm. Now, in the second paragraph, under: "Relevant

Factors," it says:

"Market and social science research on international tobacco consumption trends, including that by Boddewyn, 1986 (often cited by the tobacco industry) and ourselves, Rogers, Myers and Collishaw, 1985, offer no compelling evidence that advertising bans introduced elsewhere reduced consumption of tobacco."

10 Had you looked at those social science studies yourself, Dr. Liston, or did you leave that for Mr. Collishaw, who I think you said was the resident expert?

A- That was left for Mr. Collishaw.

Q- All right. So if, indeed, there were studies attached to this briefing document when it came to you originally -- I pause to note there are none now -- that wouldn't have been a matter requiring your attention. You wouldn't have had to read through the studies?

A- No, sir.

20 Q- No, all right. Can we agree, Dr. Liston, on looking at this document and refreshing your memory with it, that at least by December eighteenth (18th), nineteen eighty-six (1986), the advice being given to the minister from your department was as stated in RJR-46, 25 i.e. that a ban would be ineffective, possibly

unconstitutional, and would place Canadian periodicals at a disadvantage?

A- Yes, sir.

Q- Yes. In the same book, Dr. Liston, would you look at
5 Tab 51, please.

Me EVRAIRE:

51?

Me IRVING:

Yes.

10 Q- This is Exhibit RJR-51, and this time it's entitled:
"Briefing Information."

Me EVRAIRE:

Could we give Dr. Liston a moment to read it through?

Me IRVING:

15 Yes, surely. Surely.

Why don't I indicate right now, Mr. Evraire, that I'll be wanting to look at 51, 52 and 53. My Lord, it might be most convenient to give Dr. Liston just a moment to read through those.

20 A- Did you wish me to go through the others or...

Q- Well, have you gone through RJR-51?

A- I've gone through 51.

Q- All right. Well, let's start with 51. The others you will see, Dr. Liston, will give you a sense of déjà vu
25 when you look at them.

So looking at RJR-51, we've now moved from December, eighty-six ('86) to January twentieth (20th), nineteen eighty-seven (1987) and the background is stated here to be:

5 "The minister has requested that tobacco advertising be banned."

And there are a series of relevant factors which the censor has been at and there are options: Option 1, Option 2, and a series of discussions about those options and then a suggested action at the bottom, which has been blacked out.

10 Dr. Liston, do you recall -- and if you don't, I'll ask you to look at the Exhibits 52 and 53 -- do you recall that even then, even in January, after the minister had requested a ban there was a third option which did not involve a ban? Do you remember discussion of the third option?

15 A- Not characterized as Option 3, no.

Q- All right. Well then, let's look on to Exhibit RJR-52, which is a memorandum to the minister from Maureen Law.

20 Me EVRAIRE:

 Sorry, 52?

Me IRVING:

 Yes.

Me EVRAIRE:

5/0012

Doesn't seem to coincide with our 52. Oh, I'm sorry.

Yes.

Me IRVING:

5 Q- Do you recall having seen that memorandum, Dr. Liston?

A- Not specifically, sir.

Q- I'd ask you to read it, please, and see if it will
refresh your memory. You'll see it says this under
"Background":

10 "2 options for banning tobacco advertising are
presented in detail in the attached briefing
note."

Would you look at RJR-53, which is the next tab, and see
if you wouldn't agree that that is the briefing note?

15 Now, looking at RJR-53, Dr. Liston, there is a date
marked in the top right corner of January, nineteen
eighty-seven (1987), in handwriting. Do you see that on
53, not 52?

A- Top right-hand corner?

20 Q- Yes, in handwriting. It says January...

A- January.

Q- ... January something nineteen eighty-seven (1987). Do
you see that?

A- Yes.

25 Q- You didn't write that date on by any chance, did you?

A- No, sir.

Q- Staying with that document, if you'll look at the paragraph headed "Relevant Factors"...

A- Yes.

5 Q- ... you will see that there has been a discussion of Option 1 and Option 2 and then it says this:

"A third option would not actually ban tobacco advertising but may have the effect of reducing tobacco advertising to a very low level."

10

And then something has been blacked out. Now, refreshing your memory with that, Dr. Liston, do you not recall that there was a third option which was being discussed in January, nineteen eighty-seven (1987)?

15 A- As I say, there were a variety of permutations and combinations that were being discussed and explored and these were certainly some of the ones, the options that were being examined.

Q- You say there were various but looking at the documents, I see three (3). I see Option 1 and Option 2, which are referred to in each of RJR-51, 52 and 53, and then I see in RJR-53 a reference to a third option. So I only make that three (3). And the third option, it says:

20

"Would not ban advertising but may have the effect of reducing it to a very low level."

25

Do you not recall, Dr. Liston, being involved in discussions about the third option?

Me EVRAIRE:

My Lord, I wonder if I might prevail upon the Court to ask the witness to step outside? There's a comment I think it would be appropriate to make to the Court in the absence of the witness.

Me IRVING:

Is it an objection or a comment?

10	Me EVRAIRE:
----	-------------

Well, a clarification that I think the Court needs at this juncture.

THE COURT:

15 Would you step outside, Dr. Liston, just for a few minutes? Outside the court.

Me EVRAIRE:

He'd never come back if he walked way outside.

(WITNESS LEAVES THE COURTROOM)

20

Me EVRAIRE:

My Lord, I just wish to bring to the Court's attention that -- and this is for purpose of clarification -- RJR-51, 52 and 53 are draft memos and it was Mr. Collishaw's testimony that these never made it out of

Mr. Collishaw's office, so that in fairness to the witness, he's being asked to remember some documents which probably he never saw and that was certainly the testimony of Mr. Collishaw. And I have the reference there for Your Lordship if you'd wish to have note of that. It's in Volume L, at page three one two one (3121) to page three one four one (3141).

THE COURT:

Three one -- three one what?

Me EVRAIRE:

I'm sorry, it's Volume XX and it then goes over to Volume XXI, from pages three one two one (3121) to three one four one (3141).

Me IRVING:

Could you wait just a sec. till I get a volume, Mr. Evraire?

Me EVRAIRE:

Yes, certainly.

Me IRVING:

You say Volumes XX and XXI?

Me EVRAIRE:

Volume XX and XXI, page three one two one (3121) to three one four one (3141).

Me IRVING:

Page three one two one (3121) ...

Me EVRAIRE:

To three one four one (3141). I don't have the specific reference within those pages.

Me IRVING:

5 Well, I have it.

THE COURT:

"That it did not leave the Health Protection Branch."

Me IRVING:

10 Protection Branch. It didn't say it didn't leave his office.

Me EVRAIRE:

Well...

Me IRVING:

15 What other pages were you referring to?

Me EVRAIRE:

Well, the reference I had here, unfortunately is not more precise -- it's from three one two one (3121) to three one four one (3141), Mr. Irving.

20 Me IRVING:

Three one...

Me POTTER:

It's at three one three seven (3137), My Lord, and three one three eight (3138).

25

Me IRVING:

Q- Well, as far as 52 is concerned, Mr. Collishaw said at line twenty-one (21), page three one three eight (3138), he said he wrote it for Maureen Law's signature. And

5 then he says this:

"The decision as to whether it would even be shown to Dr. Law or whether she wanted to sign it or not, it would be other people who would make those decisions, rather than me."

10 So...

Me EVRAIRE:

I have a bit of a handicap, since I don't have the volume, but Mr. Potter, I understood found the reference at what -- three one three seven (3137)?

15 Me IRVING:

Well, I've just read it.

THE COURT:

If you just read the last two (2) pages.

Me EVRAIRE:

20 Yes. I don't seek to cut my friend's questions out, that's not my purpose, but I think in fairness to the witness, I felt that should be brought to the Court's attention.

THE COURT:

25 Well, anyways, I think that the question was directed at

whether or not there was a third option considered at that time and...

Me EVRAIRE:

And I have no difficulty with the question being put at...

THE COURT:

To which Dr. Liston said: "well, there were a variety of combinations..."

Me EVRAIRE:

Indeed.

THE COURT:

And Mr. Irving, using the three (3) documents, is trying to refresh the witness' memory -- maybe with success or without success, I don't know.

Me EVRAIRE:

But I thought it was important that I brought...

THE COURT:

Well, your point is noted.

Me EVRAIRE:

Thank you.

Me IRVING:

My Lord, the reference to the third document is at page thirty-one forty-two (3142) and Mr. Collishaw says it was decided by his superiors not to advance that briefing note any further, but I don't know who his

superiors were that made that decision. Dr. Liston is his superior.

Me EVRAIRE:

A superior.

5 Me IRVING:

Well, one, yes.

Me EVRAIRE:

Well...

THE COURT:

10 Okay. Would you call back, Dr...

(WITNESS RETURNS TO THE COURTROOM)

Me IRVING:

Q- Dr. Liston, courtesy of Mr. Mitchell as usual, My Lord,
15 I want to show you yet another document which is, this time, a memorandum to you from Dr. Somers dated January the twenty-third (23rd), nineteen eighty-seven (1987).

THE COURT:

Has it been filed?

20 Me IRVING:

ITL-27, Tab 50.

Q- It opens by saying this:

"I have attached a number of documents for
your consideration pertaining to banning
25 tobacco advertising:

1. A briefing note outlining two options for
banning advertising, incremental spending for
health protection programs was estimated in
consultation with Field Operations Directorate
and applies not only to both options for
banning advertising..."

And then it's struck out. And I direct you also to
paragraph five (5):

"A memorandum to the minister outlining the 2
options for banning tobacco advertising and
suggesting a third option that may possibly
have the effect of reducing tobacco
advertising to an insignificant level without
actually prohibiting it."

Now, Dr. Liston, do you recall having received that
memorandum from Dr. Somers and the documents to which it
refers?

A- I have no personal recollection of having received it, I
assume that the document reached my office.

Q- M'hm. Now, I will go back, if I might, to RJR-52, Dr.
Liston. Look at the last paragraph, if you would, under
the heading: "Recommended Action."

"You may wish to indicate whether you would
prefer to ban tobacco advertising as outlined
in either Option 1 or Option 2 of the attached

briefing note, or to proceed with the recommended option."

Now, Dr. Liston, when looking at the documents you've just been looking at, would you not agree with me that the recommended option was the third option, i.e. not to ban advertising, but to take steps to reduce its levels?

A- It would seem so from the document.

Q- Yes. Do you have any recollection, Dr. Liston, of any subsequent discussion of that third option?

A- As indicated previously, I don't have a recollection specifically to ...

Q- M'hm.

A- ...an option number and what that number or what the option ...

Q- M'hm.

A- ...and the number might contain.

Q- Well, leaving aside option numbers, have you got -- have you any recollection in the weeks or months following, of ever coming back to this question of an option which would not ban advertising, but would have the effect of substantially reducing levels of advertising?

A- I can't bring forward the details of what that option might have been.

Q- And you can't recall having ever had any discussions concerning it again?

A- Since I can't recall the option, I don't know whether I may have had some discussions that were relevant to it or were part of it. I ...

Q- It's all just a blank, Dr. Liston?

5 A- Yes, sir.

Q- At about that time, Dr. Liston, January of nineteen eighty-seven (1987), had you become aware of the progress of a Private Members Bill through parliament?

A- Yes, sir, I did.

10 Q- That was Bill C-204, Ms McDonald's bill?

A- Yes, sir.

Q- Do I understand correctly that at a certain moment, sometime in late nineteen eighty-six (1986), through the operation of the rules of the House of Commons, Ms McDonald's bill was accorded a substantial amount of debating time in the house?

15

A- Yes, sir, it was.

Q- Do you recall approximately when that happened?

20

A- It would be around late eighty-six ('86), eighty-seven ('87)...

Q- M'hm.

A- ... in that period of time.

25

Q- M'hm. If you would look with me at Exhibit RJR-61, which is in the book in front of you. That appears to be a memorandum again from Dr. Somers to you, dated

February third (3rd) nineteen eighty-seven (1987). Do you recall having received it, Dr. Liston?

A- I would assume so, yes, sir.

7/0024

Q- M'hm. It begins by saying:

5

"The minister has expressed his desire to ban tobacco advertising and to preempt Private Members Bill C-204."

10

Do you recall having heard that prior to the receipt of this memo or did you get that information out of the memorandum itself? Do you remember?

A- No, I had discussions with the minister's staff and the minister, where he clearly expressed his preference that as minister of National Health and Welfare the bill regulating tobacco advertising and so on should be his.

15

Q- Do you recall, in looking at the memorandum, Dr. Liston, what the five (5) documents which were said to be attached were?

A- I regret, sir, no.

20

Q- If you turn back to Exhibit RJR-58, you will see that those are speaking notes for the Honourable Jake Epp and they are dated March nineteenth (19th), nineteen eighty-seven (1987). I'd like to draw your attention in particular to page two (2), which is headed "Priority and Date of Introduction". Did you have anything to do with the preparation of this document, Dr. Liston?

25

A- To the extent that I believe a member of my staff prepared it, yes.

Q- And who is that?

A- That would probably be the Tobacco Products Control Unit, Mr. Collishaw ...

Q- Yes.

A- ...or one of his members of staff.

Q- When we look at page two (2), second paragraph, Dr. Liston, it says, in reference to the Private Members Bill C-204:

"Support for this bill is growing and it may well pass, unless it is preempted by government initiatives to effectively deal with the tobacco issue. To effectively preempt Bill C-204 and ensure maximum benefit to the government, it is advisable that this bill be introduced in first reading at the earliest possible date, March 27th."

Would you agree, Dr. Liston, that the duty of obtaining maximum benefit for the conservative government is nothing which concerns the Public Service of Canada?

A- I would not have qualified that as a statement that dealt with -- shall we say, politics or one party or another. There were a number of difficulties with the Private Members Bill and it was appropriate that the

leadership on this issue -- at least this was Minister
Epp's statement -- it was appropriate that the
leadership come from the Department of National Health
and Welfare. The bill that we were proposing had some
distinct advantages over Bill C-204.

Q- I see. So your evidence to the Court, Dr. Liston, is
that the sentence I just read to you, and particularly
this:

"To effectively preempt Bill C-204 and ensure
maximum benefit to the government..."

-- is not a political statement?

A- It's support for the party in power. It's not a --
either Progressive Conservative or Liberal strategy,
it's the strategy of the governing party and our
function was to essentially support that.

Q- I see. Reading on at the bottom of that paragraph, it
says:

"Delay past that date will make it
increasingly more difficult for the government
to effectively answer criticism that it has
acted only after being pushed into such action
by an opposition Private Members Bill."

Do you characterize that the same way?

A- Yes, it's government strategy.

Q- Now, Your recollection is that you had no part in the

preparation of this, Dr. Liston?

A- I did not write it, sir.

Q- M'hm. Did you direct or supervise anyone in the writing of it?

5 A- No, not in the narrow sense of that.

Q- Did you take it to Mr. Epp?

A- I did not take it to Mr. Epp. It was provided, again through my office, to Mr. Epp or to members of his staff probably.

10 Q- Did Mr. Collishaw leave it with you to deliver to Mr. Epp?

A- I can't give you a specific recollection to confirm or deny that question.

15 Q- M'hm. Were you involved in any form of consultation with representatives of the provinces, Dr. Liston, at any time between January, nineteen eighty-seven (1987), when the minister announced his intention, and the actual introduction of Bill C-51?

20 A- There may have been discussions at the -- at the conference of deputy ministers, but I would have to refresh my memory by going back over that agenda during that period.

25 Q- But as far as you're able to tell the Court at the moment, you don't recall yourself having participated in any such consultations or discussions?

A- No, sir, I have no recollection of that.

Q- I think we can put that book away now, Dr. Liston, and I want to show you -- would you look, please, at Exhibit RJR-103, Dr. Liston? That begins at page seventeen eight o eight (17808), and I'd ask you first to look at page seventeen eight o nine (17809), Dr. Liston, which is a memorandum to you and Peter Glynn from Ian Green.

Do you recall receiving that?

A- Yes, it was received.

10 Q- M'hm. Who was Mr. Green, just to refresh my memory?

A- Ian Green is the Assistant Deputy Minister of Policy -- the title here: "Policy Communications and Information."

Q- Now, if we turn the page, we would find a document entitled: "Arguments and Counter-Arguments."

15 And there are a series of handwritten comments on some of them which I'd like to go through with you, Dr. Liston.

A- M'hm.

Q- Looking at page seventeen eight ten (17810), would you tell the Court whether those are your handwritten notations?

A- Some of them are, and some aren't.

Q- Right. Which ones are yours, Dr. Liston?

A- On the left-hand margin, that is my writing.

25 Q- Could you read that out for me, please?

A- I'm having difficulty with some of it. The first word is lost to me:

"...argument would be..."

The rest is hardly legible. I'm having difficulty.

5 Perhaps there's a better copy of it.

Q- My Lord, could I borrow the Court's just for a moment. Ours have been put in looseleaf books and I think that's one of the problems for at least one word.

THE COURT:

10 My official copy isn't better.

Me IRVING:

It's not better.

THE COURT:

Well, you could show it to him.

15 A- Something...

"...argument would be..."

-- it looks as if the word may have been "policy."

Me IRVING:

Q- M'hm. Does it not say:

20 "Our argument would be on policy grounds?"

A- That could be, yes. It's conceivable.

Q- Well, let's...

A- And the second comment down that page is:

"This offers grounds to dispute our position."

25 Q- Is that in your handwriting?

A- Yes, sir. The remainder is not.

Q- The remainder is not. Fine. If you would turn then to page seventeen eight twelve (17812), you'll see the argument as stated is:

5 "Consumers will be denied product information about cigarette brands, tar levels and any new tobacco product developments."

Then there are two (2), three (3) counter-arguments and I'd like you to look at the second, which says:

10 "It is claimed that the switch to filter cigarettes and lower tar cigarettes has been assisted by advertising. Based on sales trends, whatever health benefits there may be from use of filters and lowering of tar and
15 nicotine levels have already been realized."

And somebody has inserted the word: "may" have already been realized.

Was that you, Dr. Liston?

A- No, that is not my writing.

20 Q- That's not you, okay. And then it goes on to say:
"Further efforts in this direction may be counter-productive in that they may mislead consumers into believing that low yield cigarettes are safer than they really are."

25 Do you see that?

A- M'hm.

Q- And then in the margin someone has written:

"We criticize our own initiative. Please
delete."

5 Is that you?

A- That is me, sir, yes. That's my writing, that is.

Q- Yes. And somebody has written on the right-hand margin:
"delete" in respect of that sentence I just read to you.
Was that you?

10 A- No.

Q- Would it appear, Dr. Liston, that that was someone
responding to what you had written?

A- It would seem so, yes.

Q- Yes. And when you say: "we criticize our own
15 initiative," you mean, do you not, Dr. Liston, the
initiative of the government of Canada in pushing for
lower levels of tar and nicotine and cigarettes sold in
Canada.

A- Yes, I thought that it was not necessary to have that as
20 part of the counter-arguments.

Q- M'hm. But my question was: when you say, "we criticize
our own initiative," the initiative you're referring to
is that of the government of Canada in pushing for lower
tar and nicotine levels in Canadian cigarettes?

25 A- Yes.

Q- Yes. An initiative which had been pursued for many years, had it not?

A- Yes.

Q- In fact, Dr. Liston, the use of ultra low tar cigarettes in Canada is not very common to this day, is it?

A- I ...

Q- Do you ...

A- I'm aware of a general trend towards lower tar and nicotine, but your definition of ultra low and what the figures might be at this time, I don't have.

Q- You don't keep up to date with those sort of details now?

A- I don't follow the market that closely. That would be done by members of my staff.

Q- All right. Let's look at the next page, seventeen eight thirteen (17813), the third of the counter-arguments that has a comment written opposite. Would you tell the Court whether that is written in your handwriting?

A- I recognize it as my handwriting, yes.

Q- It says:

"The product is legal, use other term."

A- Yes.

Q- And that's in reference to the expression: "legitimizing tobacco use?"

A- I'd have to read the paragraph, sir, to confirm.

Q- Just a second and read it, Dr. Liston.

A- Yes, it does, sir.

Q- Right. Would you turn, please, to seventeen eight
nineteen (17819), where the fourth counter-argument
5 refers to public health damage due to alcohol misuse and
then compares it to cigarettes.

Underneath there is a long handwritten note. Did
you write that, Dr. Liston?

A- Yes, sir.

10 Q- Can we read it together to make sure that we understand
it? Could you read it aloud?

A- The note says:

"Let's not play the numbers game, we are..."

Q- Summing.

15 A- "...summing accident deaths which..."

THE COURT:

Strike in the early adult life.

A- "...strike in the early adult life with
chronic alcohol deaths which occur later in
20 life. This recomputing..."

Me IRVING:

Q- "His recomputing," perhaps?

THE COURT:

This.

25 A- I think there is a "T" there. I assume there is.

"This recomputing of the 30,000 figure also
..."

Q- Tends to.

Me IRVING:

5 Q- Tends.

A- "...tends ..."

Q- To highlight.

A- "... to highlight the softness of its...

Q- Derivation?

10 A- Could be, yes.

Q- Would you accept derivation?

A- I can't offer a better word.

Q- If we put in derivation, Dr. Liston, does it reflect...

A- Yes, sir.

15 Q- ... your view?

A- Yes, sir.

Q- Yes.

THE COURT:

Would that be a...

20 Me IRVING:

Surely, My Lord. I will most certainly finish before
lunch and put the pressure on Mr. Potter.

SHORT RECESS

25

CROSS-EXAMINATION BY Me COLIN K. IRVING (Contd)

on behalf of Petitioner, RJR-Macdonald Inc.

Q- Dr. Liston, just before we go on, I'd asked your counsel during the pause to show you part of the transcript of the evidence of Mr. Collishaw, just to be -- I want to be fair to you about this Exhibit RJR-58. Dr. Liston, perhaps to short-circuit it, I don't need to read out the actual transcript references. Mr. Collishaw indicated that he had prepared that under your personal direction and that on the twentieth (20th) of January, just prior to the cabinet meeting, you were involved in the revisions with him. Having read Mr. Collishaw's evidence on that, which took place a long time ago, Dr. Liston -- no reproach is intended here -- do you now recall that you in fact were involved in supervising Mr. Collishaw in writing the document originally and that you were involved, on the twentieth (20th) of January, when last minute revisions were being made?

A- I have no specific recollection of it, but I have no reason to dispute Mr. Collishaw's testimony either. It's very probable or possible.

Q- Dr. Liston, I want to show you a document which is undated, if you'd hand them to -- which is entitled "Negotiations with the Canadian Tobacco Manufacturers Counsel on the Reduction of Tar and Nicotine Deliveries

of Canadian Cigarettes". The page numbers begin at sixteen five o six (16506). Now, without reading it all the way through, Dr. Liston, I want to draw your attention to the opening paragraph.

5 Me EVRAIRE:

Well, I wonder if we might give the witness just a moment to familiarize himself with the document?

Me IRVING:

Sure.

10 A- Yes, sir?

Q- The opening paragraph says this:

"The preponderance of scientific evidence suggests that the lower the tar and nicotine levels of cigarette smoke, the less harmful would be the associated health effects. The department has adopted this position and has committed itself to reducing the tar and nicotine deliveries of Canadian cigarettes."

15 Dr. Liston, can you confirm that that is indeed the case and that the department did indeed adopt that position?

20 A- Certainly it was -- it was the strategy, the departmental position some number of years ago. There was concern, on my part at any rate, that there might be an effect of titrating, that is if you offer a smoker a lower tar and nicotine cigarette, he may smoke more in

25

order to obtain the same level of nicotine. This document has no date on it and I -- I don't know that it would be an accurate portrayal of the current position of the department.

5 Q- Have you seen this document before?

A- Not to my recollection, sir.

Q- In the second paragraph, it says:

"Negotiations have been held over the last several years with the C.T.M.C. in an attempt to achieve voluntary reductions in tar and nicotine delivery levels."

10

Seeing that, Dr. Liston, that reference to the last several years and bearing in mind your comments about the government initiative in this connection, would that help you to put a date on this document?

15

A- I would -- it may be possible to get a better estimate of the date if I read the rest of the document, but from that one paragraph, I find it difficult to try and fix a time.

20

Q- Dr. Liston, you recall though, do you not, that in connection with the initiative you've spoken of, that is to obtain lower overall deliveries of tar and nicotine, that there was a considerable campaign by the government over the years, was there not?

25

A- Yes.

Q- Yes.

A- Yes, there was.

Q- And that it was one of the objectives of your department
to make sure that the Canadian public was advised of the
5 departmental position that lower tar and nicotine
cigarettes were preferable to higher tar and nicotine
cigarettes?

A- Yes, sir.

Q- Yes. Would it be fair to say, Dr. Liston, that your
10 department in particular and the government in general,
took considerable pains to publicize that very fact?

A- Yes, sir, it did.

Q- Yes. Over quite a considerable period of time?

A- Yes, sir, it did.

15 Q- And it did that, did it not, by press releases, among
other things?

A- Yes, sir, it did.

Q- And you were very successful, were you not, in getting
large numbers of Canadian daily newspapers, for example,
20 to carry stories -- to carry press releases issued by
the department indicating tar and nicotine levels of
cigarettes and indicating your view that lower was
better than higher?

A- Yes, sir, there was media coverage of that.

25 Q- Yes, and in fact the media coverage was quite carefully

monitored, was it not, in the departments?

A- There was monitoring of media uptake, if I can describe it that way.

Q- I'm just looking at Exhibit AG-87, Dr. Liston.

5 THE COURT:

What number, I'm sorry?

Me IRVING:

AG-87, My Lord.

Q- This document is entitled in English: "Canadian
10 Initiatives in Smoking and Health." It's from Health
and Welfare Canada and I want to read you something from
page thirty-three (33), I'm reading from the English
text.

Page thirty-three (33) in the right-hand column,
15 about halfway down the page, it says this:

"The general public was identified as a fifth
target group. While every aspect of the
smoking and health program would ultimately
reach this group, materials were also produced
20 to bring the smoking message directly to the
general public via exhibits, leaflets and
public service television spots. Press
releases were employed judiciously -- only
when the story was really "news" and received
25 excellent coverage. As a result of the

search, major conferences on the tar and nicotine content of different brands of cigarettes were widely reported in the national and regional media."

5 Does that strike you, Dr. Liston, as a fair statement of what was going on in connection with low tar/low nicotine cigarettes?

A- Yes, sir.

Q- And you can confirm for us, can you, that that continued
10 to be a priority of the department over a substantial period of time?

A- Yes, sir.

Q- And that you felt, in fact, that you were successful in getting the message to the public that if they chose to
15 smoke, then low tar/low nicotine cigarettes were the preferred options?

A- That they were the least harmful -- or less harmful, I should say.

Q- That's right. And you do believe, do you, Dr. Liston,
20 that you were successful in getting that message to the Canadian public?

A- Yes, we enjoyed some success in that.

Q- M'hm. And you are aware, are you not, Dr. Liston, that
25 apart from newspaper coverage, prompted by news releases from the department, that many of the media in Canada,

the magazines for example, carried stories quite frequently on the issues of low tar/low nicotine cigarettes versus high tar?

5 A- The issue was certainly in the public domain and there was a pick-up on it. There was a lot of stories that would appear in the -- a variety of public health journals and in the lay media as well.

Q- While you still have Exhibit AG-87 in front of you, Dr. Liston, I want to look with you at another page, this
10 time page sixty-five (65).

THE COURT:

In French?

Me IRVING:

I'm looking at the English text, My Lord, which is
15 section five (5), which begins in English at page sixty-three (63).

THE COURT:

Okay.

Me IRVING:

20 Q- At page sixty-five (65), in the left-hand column, about halfway down, it says this:

"In the years that followed the federal government would make a concerted effort to encourage Canadians to take more
25 responsibility for their own health. One of

the results of this approach to health education was a thorough inquiry into attitudes towards smoking, drinking, exercise and nutrition, with the goal of learning how such attitudes might be changed."

Does that general statement ring a bell with you, Dr. Liston?

A- Yes, it does, sir.

Q- M'hm. And then carrying on at the bottom of the left-hand column, it says this:

"Health educators have tended to assume that behaviour which is hazardous to health is generally pursued because of lack of knowledge. Smoking and Health in Canada, a 1977 departmental working paper on long-range health planning described in these words the thinking that it characterized Canada's earliest smoking and health activity, adding: therefore, if people are aware of the hazards that behaviour such as cigarette smoking poses for their health, they will be more likely to alter their behaviour in order to preserve their health, indeed to alter attitudes is implicit here."

Again, Dr. Liston, do you recall that general subject

being present to the collective mind of your department?

A- Yes, sir.

Q- I'd like to carry on with you, right-hand column of page sixty-five (65):

5 "Because mass media techniques have obviously
been used successfully to market all types of
products, it has been widely accepted that
these same techniques should be very effective
in changing attitudes. This assumption seems
10 to be true in the case of loosely held or
"neutral" health attitudes. They can be
altered fairly easily if the message being
communicated relates directly to them and if
the new attitude which is being promoted is
15 consistent to the existing public opinion.
However, attitudes which are grounded in
tradition and are strongly held are very
difficult to change. This difference in
attitude strength is important in
20 understanding why the mass media are
effectively used to sell a brand of cigarettes
that might fail to convince a smoker to quit
or a non-smoker not to start."

11/0020 Now, do you recall that part of the discussion, Dr.
25 Liston?

A- The genesis of this -- the formulation of this and the genesis of that expression is from the Health Promotion side of the department and I don't -- I don't recall the formulation or the statement of this but recognize this document as a summary of the position of the department as a whole.

Q- So it's a summary of the view of those in the department who have responsibility for media campaigns of your own?

A- Yes.

Q- And that is the department, I think you told us, which Mr. Mintz is in -- or Dr. Mintz, I'm not sure which?

A- Yes.

Q- Yes.

A- Sorry. If I paused, it's -- we're all in the one department, but if one neglects the organizational connotation, yes.

THE COURT:

The branch.

Me IRVING:

Q- The branch of your department or the...

A- Yes.

Q- Right. Now, just before I leave it, Dr. Liston, I take it that the document I had originally shown you, the negotiations with the C.T.M.C., is a document you don't recognize as having seen before?

A- I have no recollection of it at all, sir.

Q- All right.

Me IRVING:

My Lord, I will not ask to have that marked.

5 Q- Dr. Liston, just briefly, I've been provided by Mr.
Evraire with a document entitled "Tobacco Consumption in
Various Countries," which appears to have been produced
by the Tobacco Research Council, London, nineteen
seventy-five (1975). I would ask you, if you would, to
10 confirm what your counsel said to the Court this
morning, that this is a document indicating consumption
in Finland and Norway going back prior to nineteen fifty
(1950) which was in the possession of the department.

Me EVRAIRE:

15 Well, in light of my comments earlier this morning, My
Lord, the witness is not in a position to answer the
question but...

Me IRVING:

Well, if my friend will confirm that...

20 Me EVRAIRE:

Well, indeed, as I did this morning, I reaffirm that
position.

Me IRVING:

25 And I'd like to have it marked then, please, as Exhibit
RJR...

THE CLERK:

220.

Me IRVING:

Q- May I take it, Dr. Liston, that you are not personally
5 familiar with this document?

A- I am not, sir.

Q- Do you know which branch of the department it came from,
Dr. Liston?

A- I have no knowledge, sir. If I may continue that
10 answer, it most probably would have come out of the
Tobacco Products Control Unit, but I don't know that for
a fact.

Q- Dr. Liston, I would like to show you a document -- I
should say a series of documents which deal with the
15 term "addiction". The first page is a memorandum from
Mr. Collishaw to Mr. Hickman and it's entitled "The
Meaning of the Term Addiction". And if you'll then turn
the page, you'll see there is a rather longer memorandum
from the director general, Drugs Directorate, to
20 yourself. Just staying with that second document for
the moment, which starts at page ten eight seven eight
(10878), would you have a look at it, please, and tell
the Court whether you recall having received it?

THE COURT:

25 You're referring to the second one?

Me IRVING:

Yes, My Lord. The one -- the memorandum beginning at page ten eight seven eight (10878).

A- Yes, sir.

5 Q- First of all, Dr. Liston, where does the Drugs
Directorate fit into the department?

A- It is one of the directorates which reports to me.

Q- All right. And who was the director general as of the date of this memorandum which appears to be sometime in May, nineteen eighty-six (1986)?

A- Dr. Denys Cook.

Q- Dr. Denys Cook.

THE COURT:

Q- What is B.D.D.? Bureau...?

15 A- I'm sorry, Your Honour, where would I see...

Q- "Meaning of the Term Addiction", just under.

A- Oh, yes.

Q- "Further to your request to B.D.D."

A- That is the Bureau of Dangerous Drugs.

20 Q- Okay.

Me IRVING:

Q- Dr. Liston, I may take it, may I, that you had requested this memorandum and that your request was directed to the Bureau of Dangerous Drugs?

25 A- That is correct, sir.

Q- And if you will look back just for a moment to the first page, ten eight seven seven (10877), are you able to confirm, Dr. Liston, that Mr. Collishaw, in that letter, is forwarding to Mr. Hickman the memorandum which you had requested from B.D.D. which is attached?

A- I would assume so, yes.

Q- The letter from Mr. Collishaw refers to the note from Dr. Cook. He is the director general of the Drugs Directorate, I think you just said?

A- Yes.

Q- Yes. Now, if we go back to the memorandum from Dr. Cook, there is a summary of findings and conclusions, the first of which is:

"The term "addiction" has been abandoned by the medical/scientific community. It is therefore bereft of technical meaning."

THE COURT:

"Bereft" meaning...

Me IRVING:

That there is none, it has none.

THE COURT:

... empty?

Me IRVING:

It is empty of.

Q- Do you see that, Dr. Liston?

A- Yes.

Q- And then on the next page, ten eight seven nine (10879),
the second summary conclusion is:

"The use of the term "addicting" in
association with tobacco would be inconsistent
with government policy and with department
policy."

And I draw your attention under that heading to the
second paragraph, which reads as follows:

"There would appear to be little doubt that
the word "addiction" connotes an extreme
relationship between a person and a drug.
However, this does not constitute the full
connotative meaning of "addiction" as it
ignores the patina of moral turpitude imposed
on addicts by temperance advocates both
contemporary and historical."

Do you see that, Dr. Liston?

A- Yes, I do.

Q- When you passed this memorandum on to Mr. Collishaw, did
you make any comment on any of the findings in it?

A- I'm not sure that I would have passed this memorandum to
Mr. Collishaw. I was looking for the status of the term
and was exploring its meaning, its current use, its
acceptability; and in the course of those discussions, I

-- I would have reason to believe that Mr. Hickman would become familiar with the dialogue, but the actual passing of the memorandum to Mr. Collishaw I have no recollection specifically.

5 Q- But you do note that you received it originally and then Mr. Collishaw sent it to Mr. Hickman?

A- M'hm.

Q- So in one way or another we are agreed, are we, that it went from...

10 A- Yes.

Q- ... your office to...

A- It formed part of the discussions that were going on within the Health Protection Branch.

Q- So may I take it, Dr. Liston, that you did not
15 dissociate yourself from the views expressed by the director general of the Drug Directorate when you sent this memorandum on or when it went on by whatever means it went on, to Mr. Collishaw?

A- No, I had reservations about the use of the term...

20 Q- Addiction.

A- ..."addiction," and wished to explore it more fully ...

Q- M'hm.

Q- ...to get better advice.

Q- In fact you, yourself, Dr. Liston, were of the view,
25 were you not, that addiction is a decidedly pejorative

term and not one that could appropriately be used in the context of cigarettes?

A- That was a personal view, yes.

Q- And you found confirmation of that, did you, in Dr.
5 Cook's memorandum?

A- It expressed that side of the conundrum, the difficulty.

Q- Yes. Attached to it is a transcript of an interview
with C. Everett Koop, and he was the American Surgeon
General at the time?

10 A- Yes, sir.

Q- Yes. Did you read that attachment, Dr. Liston?

A- Would you like me to do so now, sir?

Q- Well, first of all, yes, but...

A- I -- I...

15 Q- ...first of all, I was going to ask you if you recall
having reviewed it at the time?

A- I would certainly have read it at the time.

Q- Yes. Without going into it in detail, Dr. Liston, is it
not a fact that the moral issue, as Dr. Koop expresses
20 it here, the duty of a Christian not to allow any
substance to have control over him, is a view which
comes to your department from various sources, even to
this day?

A- No, I would not characterize it that way.

25 Q- No. You don't recall in your review of various

documents, this concept that there is something morally weak in the use of substances which can become habit-forming?

5 A- No, I would say that that was not one of the featured discussions or the subject of protracted debate.

Q- It's not your view, is it?

A- It is not my view, nor was it a view that was discussed in the context in any substantive way.

10 Q- Were you surprised to find it expressed by Mr. Koop in the transcript attached?

Me EVRAIRE:

The document speaks for itself, My Lord.

Me IRVING:

15 I know it does. I'm asking if -- I'm asking if Dr. Liston was surprised to read it?

Q- Or did you know that Dr. Koop thought that way?

A- I was not, if I may answer the first of your...

Q- Yes.

20 A- ...your questions, I was not surprised because Dr. Koop, as the Surgeon General, has a position, an advocacy position within the U.S. hierarchy. The reason for my concerns were that this was a regulatory program and I was looking at it in terms of how to convey useful, meaningful information that would be helpful to our
25 tobacco problem.

Q- M'hm. And it's your view generally, is it not, Dr.
Liston, that people with a strong advocacy position are
-- have a potential conflict of interest, as it were,
when they are attempting to work as a member of a
5 department such as yours which serves the whole public
and at the same time are espousing very strongly some
advocacy position?

A- Well, it is my -- it is my responsibility to ensure that
the regulatory programs are administered in such a way
10 that they are very close to the facts as best we can
determine them and that they reflect no more, no less
than the legislation which we are attempting to
administer.

Q- And that people working in your department should not
15 find themselves in the position where they are advocates
for some particular position, pro or con?

A- Well, the higher the position within the Health
Protection Branch, the less advocacy is a desirable
attribute.

Q- Okay. Because people in the department should be
20 even-handed and should look at the scientific
information dispassionately, should they not?

A- Yes, sir.

Q- They should not have their judgment coloured by strong
25 personal views?

A- Well, in formulating policy options, one must look both at the pros and cons, which means that you have to have a wider view in order to properly or appropriately advise the ministry.

5 Q- Right. Could I have the bundle of documents beginning at page ten eight seven seven (10877) marked, please, as Exhibit RJR...

THE COURT:

221, I believe.

10 Me EVRAIRE:

Is my friend also filing the attachments that go with that?

Me IRVING:

Yes.

15 Me EVRAIRE:

I note, My Lord, that Dr. Koop thinks that people who smoke in church have no class, so I don't know if my friend wanted that part in the record.

Me IRVING:

20 I think it's a very interesting commentary.

It is memorandum dated June the ninth (9th), nineteen eighty-six (1986) entitled: "The Meaning of the Term Addiction," and attachments as RJR-221.

Q- Dr. Liston, on that same subject, if you would just look
25 at Exhibit RJR-65 with me for a moment. That begins at

page four four three (443) and goes to page four four five (445), and I'd like you to look at four four five (445) if you would.

5 And you'll see, Dr. Liston, that's dated May twenty (20), nineteen eighty-six (1986), it's entitled: "Tobacco Lexicon of Terms," it deals with the subject of addiction and it appears to be a letter which you wrote to Dr. Somers, can you confirm that?

A- Yes, I did, sir.

10 Q- I see. That letter, does it -- does that letter reflect your view on the use of the term "addiction," Dr. Liston?

A- It reflected my preoccupations, concerns, on the twentieth (20th) of May, eighty-six ('86).

15 Q- M'hm. And if you look now at page four four four (444), that appears to be a memorandum from Dr. Somers and somebody has written:

"Actually, I rather preferred the pejorative term."

20 Did that come to you from Dr. Somers, Dr. Liston?

A- I recognize that as Dr. Somers' handwriting, but it's addressed to Mr. Hickman.

Q- M'hm.

A- In the fullness of time I presume it ...

25 Q- And if we go back to four four three (443), now we have

Dr. Hickman's letterhead and somebody has written at the bottom:

"Byron and I share Dr. Somers' view."

5 That would be the view that Dr. Somers prefers the pejorative term?

A- I believe that to be what Mr. Collishaw is writing there, yes.

Q- Yes. And in fact you were aware that Byron and he did in fact prefer to use the pejorative term?

10 A- Yes.

Q- Yes. Which you thought was inappropriate?

A- Yes.

Q- Yes. Dr. Liston, I'd like to show you now a letter dated, apparently, September twenty-eighth (28th),
15 nineteen eighty-seven (1987). That appears to be a letter to Mr. William Neville of the Canadian Tobacco Manufacturers Council. Could you confirm, Dr. Liston, that that is indeed a letter you sent to Mr. Neville?

A- It is, sir.

20 Q- M'hm. Now, it relates to press quotations from your staff concerning a study on second-hand smoke. If you look at page two three -- I think it's two three nine seven (2397). In any event, the last page of the bundle. There is a press clipping, Dr. Liston. May I
25 take it that that press clipping forms part of the

subject matter of your letter to Mr. Neville?

A- Yes, it does.

Q- Yes. The press clipping has to do with a study by two
(2) university professors from Simon Fraser University
and it says that their study was dismissed yesterday by
federal government experts and the Non-smokers Rights
Association.

"The study is fertilizer, said Dr. Donald
Wigle of the Health Department. I think you
should shred it and put it on your roses.
Neil Collishaw, head of the department's
Tobacco Products Unit in the Bureau of
Chemical Hazards said: Ted Sterling, one of
the authors of the study, has long been tied
to the tobacco industry. And David Sweanor,
lawyer for the Non-Smokers Association said:
Sterling has no credibility."

Was that the kind of thing you were talking about a few
minutes ago, Dr. Liston, when you said that advocacy
positions were possibly at odds with the requirements of
working in the department?

A- In this particular case, I was objecting more than
anything else to the type of language that was used
which I found to be inappropriate for a public servant.

Q- "The study is fertilizer," you didn't think that was

appropriate language?

A- No, I did not, sir. Nor do I think that it is appropriate today either.

Q- There is, at page two three nine four (2394) a handwritten note, Dr. Liston, is that yours?

A- Yes, that's my writing.

Q- Let me just read it and see if I have it correctly.

"Please prepare a reply in which we acknowledge the intemperate nature of our reply to media queries. The heart of this unfortunate event is the continuing failure to realize that we cannot be both advocates and scientific advisors."

Is that correct reading?

A- Yes, sir.

Q- Were you aware at the time, Dr. Liston, that Dr. Wigle of your department was in some way associated with the Non-Smokers Rights Association? He was, in fact, a director?

A- Yes, I was aware that Dr. Wigle was a member of the Non-Smokers Rights Association.

Q- M'hm. Did you indicate to Dr. Wigle that it would be appropriate that he should resign from that organization in view of the type of issue which you deal with in this letter of September twenty-eighth (28th), nineteen

eighty-seven (1987)?

A- I did not advise him to resign. I indicated that it was
improper for him to use his departmental title on the
letterhead of the Non-Smokers Rights Association
correspondence.

Q- I see.

A- What he, as an individual on his own time, he may
obviously enjoy the right to participate in a variety of
organizations, but he should not confuse his
professional life with his off-duty concerns,
participation.

Q- Could I have this letter marked, please, as Exhibit
RJR...

THE COURT:

Isn't it already in evidence.

Me IRVING:

I think so, My Lord.

THE COURT:

Because I've seen...

Me EVRAIRE:

Yes.

THE COURT:

...seen it before.

Me BAKER:

It may well be that you've seen it, but it wasn't

produced.

Me IRVING:

It wasn't produced at the time, My Lord.

Me EVRAIRE:

5 Are you filing this en liasse, because I note that the
handwritten note from Dr. Liston at two three nine four
(2394) was not an attachment to Mr. Neville's letter.
I've no objection if you want to do that, but I think
the record should reflect that there are different
10 things stapled together.

Me IRVING:

Yes, there are, My Lord.

THE COURT:

So it's 222.

15 Me BAKER:

The fertilizer document is in that bundle?

Me IRVING:

Yes, the fertilizer document is in that bundle.

THE COURT:

20 It could have been worse, he could have used another
word.

Me IRVING:

Yes.

THE COURT:

25 For the same purpose.

Me BAKER:

It's what I was thinking, My Lord.

Me IRVING:

Q- Dr. Liston, in that same connection, I want to show you
5 Exhibit RJR-151.

THE COURT:

151?

Me IRVING:

10 151, My Lord, it is Dr. Wigle's letter of resignation as
a director of the Non-Smokers Rights Association.

Q- Now, Dr. Liston, your letter to Mr. Neville is dated at
the end of September, nineteen eighty-seven (1987), and
I see Dr. Wigle's letter of resignation follows rather
shortly after that. Were you made aware that Dr. Wigle
15 was resigning from the directorship in the Non-Smokers
Rights Association?

A- No, I wasn't made aware of that, sir.

Q- I see. And may I have it? Do you know Mr. Gar Mahood?

A- I've had occasion to meet him several times.

20 Q- And he is the executive director of the Non-Smokers
Rights Association, is he?

A- Yes, sir.

Q- He is an advocate, is he not, of an anti-tobacco
position?

25 A- He is one of the health advocacy groups, yes.

Q- I'm showing you a letter, Dr. Liston, dated December thirteen (13), nineteen eighty-eight (1988).

THE COURT:

Letter or memo?

5 Me IRVING:

I'm sorry, My Lord, I should have said memo.

Q- This appears to be a letter which you wrote to Dr. Maureen Law, Dr. Liston, and can you confirm that to be the case?

10 A- Yes, sir.

Q- Now, you say in your letter:

"A submission is being prepared by legal counsel proposing amendments to the Tobacco Products Control Act under the Miscellaneous Statute Law Amendment Act 1989. These amendments would hopefully correct the following anomalies."

I leave out the first one and I go to (b).

"(b) Two tabloids printed in Canada would be permitted to carry advertisements prepared outside of Canada for tobacco products imported and sold in Canada.

A situation reported in respect of these amendments is attached. It would be appreciated if you would contact Mr. G.

Mahood, to determine if he will cooperate in not opposing these amendments."

Is that the same Mr. Mahood that Dr. Wigle wrote that letter to addressed to "Dear Gar?"

5 A- Yes, sir, it is.

Q- Dr. Liston, can you explain to me why the government of Canada would need to contact a Mr. Mahood to get his cooperation in enacting the laws of this country?

10 A- Well, essentially, if one is proposing to make amendments under the -- under an omnibus piece of legislation, one of the conditions for that being possible is that it is not controversial. It is intended to be an opportunity to clarify, amend or do some housekeeping and if these changes were very much
15 opposed or very contentious, then it would not qualify for amendment in this fashion.

Q- So you're telling us that if Mr. Mahood was not prepared to accept it, it would not be possible to make the amendment; is that it?

20 A- Not Mr. Mahood personally, but it's whether or not the advocacy groups would take issue with it or not.

Q- Whatever happened in respect of those two (2) tabloids, Dr. Liston? Was the Act amended?

A- My best recollection is that we did not go via the --
25 these amendments.

Q- But nevertheless assurances were given to the tabloids in question that they could go ahead, were they?

A- I believe so, but I cannot confirm that for you.

Q- But in fact it was your department, was it not, Dr.

5 Liston, which was certainly reported in the newspapers as giving assurances to the tabloids in question that notwithstanding Bill C-51, they could carry on printing their newspapers in Canada and to print them without fear of prosecution? Do you remember that?

10 A- I -- I remember the issue, I remember the problem. The resolution of it and how this information was conveyed to the two (2) tabloids, I have no details there.

14/0044

Q- But you can confirm to the Court, can you not, that the two (2) tabloids were told that it was all right to go ahead?

15

A- Yes.

Q- To print in Canada and distribute in Canada.

Me EVRAIRE:

Did my friend say "distribute it in Canada"?

20 THE COURT:

It's for export to the States.

Me BAKER:

For exportation.

Me EVRAIRE:

25 The attachment says "For exportation".

Me BAKER:

1-B.

Me IRVING:

The products imported and sold in Canada.

5 Me EVRAIRE:

1-B.

THE COURT:

10 There are two (2) tabloids printed in Canada for
distribution in Canada and for exportation to the United
States.

Me IRVING:

15 Q- Did I not make the question clear, Dr. Liston? It's
simply to get your confirmation that the two (2)
tabloids in question were indeed advised by the
department that they could continue to print in Canada
for distribution in Canada and for export to the United
States, notwithstanding Bill C-51?

A- I would have to go back to records to give you a precise
answer. I can't do it from personal recollection.

20 Q- Does your personal recollection take you to knowing that
in fact they are doing it?

A- I have no knowledge of what their status is. They may
have ceased publication, I would not know.

25 Q- Then I'm going to ask you, Dr. Liston, if you could at
the lunch adjournment double-check that for us. Thank

you. And if I can assist you, there were newspaper reports of such a decision being made which were quite widely carried across Canada.

THE COURT:

5 What are the two (2) tabloids?

Me IRVING:

I do not know their names, My Lord.

THE COURT:

Q- Do you know their names? Dr. Liston?

10 A- I'm sorry.

Q- Do you know the names of the two (2) tabloids?

A- Non, j'ai aucune connaissance.

Me IRVING:

15 May I have just a second, My Lord? My Lord, subject to that last undertaking, those are all my questions for Dr. Liston and, with the indulgence of the Court, I'll return to that this afternoon just for a moment.

THE COURT:

Okay. Do you give a number to this?

20 Me IRVING:

Yes, please. RJR-223.

THE COURT:

And I propose we resume at one thirty (13H30). Would that be suitable?

25

Me IRVING:

Surely, My Lord. One thirty (13H30)?

Me POTTER:

Yes, My Lord.

5 THE COURT:

Good. So we'll resume at one thirty (13H30).

Me EVRAIRE:

Would Mr. Potter be in a position to tell us if we would
be finished by a time suitable for Your Lordship's view
10 with all the traffic going on?

Me POTTER:

Oh, I think nearly certainly we'll be finished by three
(15H00).

THE COURT:

15 That's the idea.

Me POTTER:

Yes.

THE COURT:

Three (15H00).

20 Me BAKER:

You just got the message, Dr. Potter.

Me POTTER:

Yes.

THE COURT:

25 If possible.

Me POTTER:

If Dr. Liston will speak quickly, we'll be fine.

Me EVRAIRE:

Of course, I will have to communicate with Dr. Liston
5 with respect to that undertaking over lunch. That's
understood?

Me IRVING:

Absolutely.

Me EVRAIRE:

10 Thank you.

Me IRVING:

Communicate with Dr. Liston ...

LUNCH ADJOURNMENT

In the year of Our Lord nineteen hundred and ninety (1990),
on this nineteenth (19th) day of the month of June,
PERSONALLY CAME AND APPEARED:

5 Me IRVING:

Pour la requérante, RJR-Macdonald, Colin Irving et
Georges Thibaudeau.

Me POTTER:

Pour Imperial, Simon Potter.

10 Me EVRAIRE:

Pour le Procureur général du Canada, maîtres Roger
Baker, Claude Joyal, Lorianne Weston et Lise Tremblay et
Paul Evraire.

15

In the year of Our Lord nineteen hundred and ninety (1990),
on this nineteenth (19th) day of the month of June,
PERSONALLY CAME AND APPEARED:

5 ALBERT J. LISTON,

WHO, being under the same oath, doth depose and say as
follows:

10 CROSS-EXAMINATION BY Me COLIN K. IRVING (Contd)

on behalf of RJR-Macdonald Inc.

Q- Dr. Liston, at the lunch adjournment were you able to
get any information about the question we had left over?

Me EVRAIRE:

15 My Lord, we have not obtained that answer yet. We're
still working on it.

Me IRVING:

My Lord, with the Court's permission, I will defer that
until a later stage this afternoon.

20 Me POTTER:

Thank you, My Lord.

CROSS-EXAMINATION BY Me SIMON POTTER

on behalf of Petitioner, Imperial Tobacco Limited

25 Q- Dr. Liston, let's change gears a little bit. Can you

tell me, have you heard the initials I.S.O.?

A- I have heard those initials referring to International Standards Organization, yes.

15/0064

5

Q- And how do they fit into cigarettes? What do they do for cigarettes?

A- There are -- there are international meetings to establish methods for testing and methods of testing cigarettes have been addressed by the I.S.O.

10

Q- I see. And the tar numbers which we see on the packages of cigarettes these days, do they have anything to do with I.S.O.?

A- Sorry, is that question: have they been analyzed using an I.S.O. method?

Q- Yes.

15

A- Initially, we did not use an I.S.O. method. I know there were some discussions about a conversion to an I.S.O. method. The details of what's on a package at this moment, I'm not sure if they've worked their way through the system yet.

20

Q- Well, you are aware, however, that the Tobacco Products Control Act requires conversion...

A- Yes.

Q- ... from another method to I.S.O. method?

A- Yes.

25

Q- And the I.S.O. method is a method of measuring tar

content, is it not?

A- Yes.

Q- And what was the old method called?

5 A- I'm sorry, I don't have a recollection of what the old method's name or nomenclature was.

Q- I see. Do you know if both methods come up with the same result measuring the same cigarette?

A- No, I believe that there were some differences between the two (2) methods.

10 Q- And is it not so, Dr. Liston, that the I.S.O. method, the one now required by the T.P.C.A., will generally, for the same cigarette, give a higher result?

A- I believe it is related to butt length. Apparently, this has some impact on the number that is derived.

15 Q- Because is it not so, Doctor, that the I.S.O. method measures the tar content by smoking the cigarette down to a shorter butt length?

A- Yes.

20 Q- And therefore necessarily comes up with a somewhat higher tar content than the older method?

A- Yes.

Q- Right. And this change over from the old system to the new system will then -- correct me if I go wrong -- for one brand of cigarettes, if the brand is not changed, result in a higher tar level in a cigarette package,

25

will it not?

A- It will not result in a higher tar content in the cigarette. It will result in a reporting of a higher value for the tar content.

5 Q- Well, very good, you've done it more clearly than I did it. And that if a consumer of a particular brand sees the reported tar content go up on his brand, is there any way for him to know that that is simply because of the measurement change?

10 A- In the main, there is no methodol -- or no additional information available to him on the package of cigarettes.

Q- No, and of course the manufacturer cannot advertise the change; and what I'm asking is: has your department, Dr.
15 Liston, done anything to inform consumers that the change, if the consumer sees one, really doesn't mean that the brand has changed?

A- Well, our position was that using the I.S.O. method, a more accurate or a more representative value was being
20 portrayed.

Q- Yes, that wasn't my question, however. My question was has your department done anything to make sure that smokers who see this increase in reported tar level realize or are reassured that nothing has really
25 happened to their brand?

A- I believe there was some -- there was some planning associated with perhaps advising, or developing a strategy to advise, should there be any inquiries from the media.

5 Q- That also wasn't my question. Has anything actually been done to reassure consumers, who see the tar level reported on the side of the package go up, that nothing has happened to their brand?

A- No, we had no desire to reassure consumers.

10 Q- No, and I take it that your department did not, as it may have done with these two (2) tabloids, tell tobacco manufacturers: "don't worry about the ban on advertising, you can of course advise your consumers that nothing has happened to the tobacco -- to the tar content of their brands." Did your department give such a reassurance?

A- I'm sorry. I may have lost the question. Did our department give reassurance to the tobacco manufacturers...

20 Q- That they could use advertising to give this information to consumers?

A- I'm not aware of our having made those undertakings.

Q- No. And similarly, a consumer who smokes a given brand, both before and after the change in measurement, and the brand shows no change in reported tar level, that must

25

be, must it not, Doctor, because the cigarette has changed?

A- Yes, or the filter, et cetera.

Q- Someone has done something to the cigarette to change it?

A- Yes.

Q- And are you not aware that there are brands that fit into that category for which the tar levels reported have not increased?

A- I am not aware.

Q- You're not. And similarly, nothing has been done to advise those consumers that in fact the tar content of their cigarette has been reduced?

A- No, nothing has been done.

Q- No. And do you agree with me that it's a matter open to dispute just how short the average Canadian smokes his cigarette? How short a butt length he leaves?

A- There has been some differing opinion on it, but...

Q- Answer: yes, a matter of dispute?

A- There has been some differences, yes.

Q- Yes. And do you agree with me, as well, Doctor Liston, that these rankings, whether it be I.S.O or the old method or other methods, because we know around the world there are several, that they don't give an absolute value for each cigarette, do they? Aren't they

really a method of simply ranking various brands?

A- They're more than just ranking. They tend to represent the amount of tar, nicotine, carbon monoxide that can be extracted, inhaled from a cigarette.

5 Q- Yes, of course, any smoker will get that amount of tar or nicotine or carbon monoxide only if he smokes it down to the exact butt length and in exactly the same way as the machine smokes it; isn't that correct?

A- That is correct. You can get more or less depending on
10 how he smokes it.

Q- Exactly. So it doesn't tell him how much or how little he's getting, but it does give him a method of ranking the cigarette vis-à-vis the other cigarettes; isn't that so?

15 A- It can be used in that fashion, yes.

Q- Well, doesn't it in fact give that information?

A- Well, it gives -- if one wants to do comparisons, it can provide a basis for comparison, but it also provides information if the individual only buys one package of
20 cigarettes.

Q- M'hm.

A- It tells him whether or not there is tar, carbon monoxide, nicotine.

Q- M'hm. And that information, you think, is useful to the
25 consumer?

A- It is helpful to him, yes.

Q- M'hm. Well, Dr. Liston, I'd now like to get into an area which I think Mr. Irving touched on peripherally. It's the subject of the negotiations with the C.T.M.C.

5 Do you know what I mean when I talk of negotiations with the C.T.M.C.?

A- I think I may.

Q- Well, you understand, don't you, that these are the discussions that you were mandated to enter into by your
10 minister with the C.T.M.C.

A- Yes.

Q- And they had to do with the question of whether it was possible to come up with some kind of voluntary system rather than a legislated imposition regarding
15 advertising; is that not correct?

A- I was designated by the minister as the person for -- to whom the industry could contact in terms of what initiatives they would wish to suggest back to the department.

20 Q- But were these not initiatives designed to come up with some kind of a voluntary program, a voluntary code, an amended code, some system which would avoid the necessity of legislation?

A- Yes.

25 Q- Yes. Well, just in order to set a little bit of the

background -- excuse me -- let's have a look at this document.

Could I ask your help, Dr. Liston, to pass a few copies on to your counsel? I'm looking at a document which appears to be dated nineteen eighty-five (1985), Dr. Liston, which has the Attorney General's numbering, five six nine eight (5698) through five seven o two (5702). Is that your signature at the bottom right of the first page?

5 A- Yes, it is.

Q- And it's entitled, this document: "A Request For Briefing Information." And do I take it that you were approving, it appears, your own request for information from Dr. Bray?

15 A- That is correct.

Q- That's correct. And as we turn the page, do I take it that the briefing information appearing on page five seven zero zero (5700) is the answer which you got?

THE COURT:

20 I'm sorry, I'm not sure I'm following you. Are you talking about the next page?

Me POTTER:

Two (2) pages farther.

THE COURT:

25 Oh, two (2) pages. I'm sorry.

A- The page numbered five six nine nine (5699) seems anomalous in this context. I would not normally have forwarded that as a briefing for the minister with that page at -- I don't know what its source is. But
5 certain...

Me POTTER:

Q- But that page as well, is signed by you?

A- Yes, it is.

Q- Yes.

10 A- But then five seven zero zero (5700) seems to be a response to the request on five six ninety-eight (5698).

Q- Okay. Well, let's go to that document then, and let's turn to the last page, and I'm in the middle paragraph on that last page, Dr. Liston, which reads:

15 "Whether the industry response included a voluntary withdrawal of advertising or not, the government's objectives would be better served by a requirement for listing of toxic substances and rotating health warnings than
20 by a prohibition of tobacco advertising."

Does that ring a bell for you, have you seen that paragraph before?

A- Yes, sir.

Q- And am I not correct, Dr. Liston, in saying that at
25 least at that time, and we'll find out whether this held

true later on, the view which you received by that memo was that it was better to give more information rather than to permit less?

5 A- On the labelling we espouse the view in a number of our regulatory programs that more information is desirable. More information to the consumer is a desirable feature.

Q- And in fact it would meet the government's objectives better than a tobacco advertising ban? That was your department's view, was it not?

10 A- At the time that this memo was written it was suggesting that rotating health warnings as part of the labelling of tobacco products would be more desirable than a voluntary withdrawal of advertising.

Q- Or than a prohibition of tobacco advertising?

15 A- Or a cessation of advertising, whether voluntary or prohibited.

Q- M'hm. And reading on in that same paragraph, we read that towards the end of the paragraph:

20 "An advertising ban which is almost impossible to enforce because of the considerable print material which originates in the United States."

Do you remember that being discussed at that time?

A- Yes.

25 Q- Yes. And can you tell us, Dr. Liston, whether anything

was done after that time or whether anything happened which would make enforcement either more easy or more difficult?

5 A- The consideration of having the force of the regulation apply to Canadian publications printed in Canada was devised and the material coming in from the United States prepared in the United States would not be subject to it.

10 Q- Except for that, what we all know about, reading the T.P.C.A., except for that, nothing happened in order to change the difficulty of enforcement, did it?

A- No, that's correct.

15 Q- No. And if we come back to that page which you signed, page five six nine nine (5699), I see that you wrote two (2) recommendations, the first one of which was labelling across the package to give it more prominence. Example, "The Minister of N.H. & W. advises that...." et cetera, et cetera.

20 Do you understand what I say, Dr. Liston, when I say attributed warning?

A- Yes, I do.

Q- And clearly what you had in mind then was an attributed warning, was it not? A warning attributed to your minister?

25 A- This -- the statement the way it is developed there is

an attributed warning, I agree. The relevance of it being associated with the other document, I feel uncomfortable with, because it normally does not form part of a briefing package. That is written on my office notepaper and it seems very unusual and I would not have normally...

Q- Doctor -- that's fair enough, Doctor, that's fine. Let's register your discomfort and I'm quite happy to have your statement that you don't think it belongs here.

The reason it's there is that it is numerically in sequence and I did not want to produce a partial document.

A- M'hm.

Q- But you tell us that this document belongs somewhere else off on its own, that's fine with me. Whatever it is, wherever it belongs, you confirm to me that what you had in mind was an attributed warning?

A- In terms of providing the minister with advice and developing a policy position, attributed warnings, to the best of my recollection, were never favored. In our discussions with the tobacco industry, attributions of this type were not the preferred option.

Q- Not whose preferred option? The department's?

A- The department's.

Q- Well, what I'm trying to get at is here clearly you had
in mind an attributed warning and at some point in time
your department developed the preference that there be
no attribution, and I'm trying to find out just about
5 when.

A- I'm sorry I can't help you on this one because this
document stands out as -- shall I say, unusual.

Q- I see.

A- And I don't know what the context was. I...

10 Q- Well, that's fine.

Me POTTER:

In that case, My Lord, might I suggest, because of Dr.
Liston's explanations, that the document 5699 bear one
exhibit number and the entire rest of the document bear
15 another number?

THE COURT:

We'll start with the request for briefing info, give a
number to that.

Me POTTER:

20 So 5698, 5700, 01 and 02 will be ITL-55 and then the
document 5699, that is to say Dr. Liston's two (2)
recommendations regarding sale and labelling, will be
ITL-56.

Q- Now, as concerns ITL-56, Dr. Liston, that is to say the
25 question of attribution...

A- M'hm.

Q- ... you can't help us when the department developed its preference for non-attributed warnings, but can you at least tell us that the preference did come one day, there was a discussion and the department decided that it would be better not to allow attribution?

A- Yes, that is correct.

Q- Yes. And can you tell us why it was decided that the department preferred not to allow attribution?

A- In the sense of the effectiveness of the warning, it was felt that it would be a more -- a more helpful, a more meaningful warning to have a statement which is not attributed to the minister as opposed to one which the tobacco industry might claim that it was the minister's view only and that they were forced to make that statement on the labelling.

Q- So do I take it, Dr. Liston, it was decided within your department that the thing would have more effect if you made it look as though it was coming from the industry itself?

A- Yes, with no attribution.

Q- Yes. Well, if you made it look as though it was coming from the industry itself. The answer is yes?

A- Yes.

Q- Yes.

Me POTTER:

If we are going in chronological order, My Lord, I would now refer to Exhibit RJR-219 which was filed earlier today. I only point it out so that your notes can show that RJR-219 would be the next chronological document but I don't intend to ask Dr. Liston any questions further than those already asked by Mr. Irving.

Q- Moving on however, Doctor, I'd like to show you Exhibit ITL-27-31. It has already found its way into the record of the Court. Once again, I ask for your help. Now, this document is a briefing note regarding the C.T.M.C. brief which your department had received. Now, do you remember this briefing note?

A- No, sir. I believe this was prepared by Policy Planning and Information.

Q- Well, whoever it was prepared by, did you see it? And I don't want to mislead you or trick you or get you to say things without your memory. I can show you a document, Dr. Liston, in which you got a copy of this.

A- Quite possible, yes. I'm sorry, would you ask me the question again and I'll try...

Q- Did you get this briefing document on the C.T.M.C. briefing?

A- The departmental system would have me receive such a briefing before it was forwarded to the minister but I

don't have any personal recollection of having examined it at this time.

Q- And if I just show you this document, which has the Attorney General numbering 17522, in which it is --
5 appears quite clear that you received a copy of a memorandum from Mr. Beavis to the deputy minister, dated July nine (9), nineteen eighty-six (1986), to which was attached the same briefing note, does that refresh your memory?

10 A- Certainly there was contact with the Health Protection Branch as Mr. Beavis indicates in this transmittal note.

Q- But your memory is no clearer as to whether...

A- No, I don't have a personal recollection of having seen this. I'm not trying to deny it, I just don't remember it.
15

Q- I see. Now these -- this briefing note and the C.T.M.C. brief to which it refers, Dr. Liston, this is part of those negotiations that we were mentioning before, is it not? It's in that context that you received the
20 C.T.M.C. brief?

A- Yes.

Q- Okay. And do you confirm to us, as the document seems to say, that the departmental position at that time in those negotiations was that it was possible to imagine a
25 voluntary system rather than a legislated one?

A- Yes.

Q- Yes. And you confirm to me as well that the departmental position was that it was not necessary to go as far as an advertising ban?

5 A- A final decision or a final policy position had not been determined at that time and certainly one of the options that was being looked at was the voluntary aspect, the voluntary ban, how it could be strengthened.

Q- Well, the position your department was taking with the tobacco industry was that it was not necessary to go as far as a complete ban, was it not?

A- That decision had not been taken, so it was not necessary, it was not obligatory, no.

Q- Well, that's what I'm trying to get at. At that time your department didn't believe it was necessary to have a ban, did it?

A- The minister had not made such a decision, the department had not said it was obligatory.

Q- So do you agree with me?

20 A- Yes.

Q- Yes. I'd now like to turn to a document which has to do with a media campaign.

Me IRVING:

My Lord, with the Court's permission. I have a call I was supposed to make at two o'clock (2H00), if I could

25

be excused for a few minutes?

THE COURT:

No problem.

Me IRVING:

5 Mr. Thibaudeau will be here.

Me POTTER:

Q- Dr. Liston, I'm showing you a document which bears the
Attorney General numbering seventeen five five five
(17555) to seventeen five five six (17556), it's dated
10 September seventeen (17), nineteen eighty-six (1986) and
it is entitled briefing note, subject: September
seventeen (17), nineteen eighty-six (1986) media
campaign by the Non-Smokers Rights Association.

15 This is the same association you mentioned this
morning with Mr. Irving; is it not?

A- Yes, sir.

Q- It's an advocate's association?

A- It's part of the health advocacy group, yes.

Q- Right. And it's fair to say that they have carried on a
20 media campaign for many years?

A- Yes.

Q- In relation to smoking?

A- Yes.

Q- Yes. And is it fair to say that over the years your
25 minister, whoever he or she may have been, has been

concerned about the pressure generated by the N.S.R.A.?

A- I'm -- I have difficulty with the context. Certainly they are viewed as allies of the department in trying to promote a health message, and we are sensitive to the statements that are made by the N.S.R.A.

Q- All right. That's fine. And do you confirm to me, Dr. Liston, that as of September of nineteen eighty-six (1986) there was no thought of moving to an ad ban?

A- That is correct.

Q- And so that even with media campaigns by the N.S.R.A. -- and you did not take the position inside your department that the negotiations with the C.T.M.C. were futile?

A- There had been a number of difficulties where the voluntary program had been breached and this had caused us some concern. We had not at that time recommended or suggested that the minister consider the -- a legislated ban.

Q- Well, in fact, you never recommended that at all, did you?

A- Later, yes.

Q- Option 3 was a legislated ban?

A- I didn't designate it as Option 3. I had discussions with the minister in which we discussed the feasibility of doing so with the minister and the minister's staff, et cetera.

Q- That's right. And then after that meeting with the minister, then you started writing documents about a ban?

A- Yes.

5 Q- Yes. Now, have you seen this document before, the seventeen -- September seventeen (17), eighty-six ('86) document? You were aware of such documents, preparing the minister for media campaigns?

A- I -- let me refer to my reply. Normally I would have
10 seen that in the course of the departmental communication.

Q- I see. Well, let's produce that then as Exhibit ITL-57.

THE COURT:

ITL-57?

15 Me POTTER:

Q- And Dr. Liston, I would now like to show you a letter dated October nine (9), nineteen eighty-six (1986), sent by the minister to Mr. Norman McDonald, the president of the C.T.M.C. You know Mr. McDonald, don't you?

20 A- I have met him, yes.

Q- In fact, didn't you meet him several times during those negotiations?

A- I have met him on several occasions.

Q- In the context of those negotiations?

25 A- Certainly including the context of these negotiations.

Q- Right. And if we go to the second page, these are, are they not, the minister's reactions to the position espoused by the C.T.M.C. in those negotiations, are they not?

5 A- Allow me to read the letter, if you don't mind.

Yes, this is the minister's response to the brief.

Q- Right. And if we go to the top of page two (2), I'm looking at the top paragraph in which the minister writes:

10 "Your lifestyle advertising proposal is, in my view, very weak and leaves far too much scope for continued lifestyle advertising depicting smoking as glamorous, healthy and exciting."

Do you agree with me, Dr. Liston, that at that time, whether within your department or from the minister, the view was still that there could be some advertising?

15 A- At this point the minister was indicating the undesirability, in his view, of advertising, more specifically lifestyle advertising, and we were in a -- shall we say a transition period.

20 So I cannot depict for you a departmental acceptability of advertising during a period when the voluntary program was deemed not to satisfy some of our health concerns...

25 Q- But Dr. Liston...

A- ... so we were in a shifting from one to another policy position.

Q- Well, I think it's very clear that there was some shifting going on. I'm just trying to find out exactly when the shift happened, because what the minister is talking about here is clearly not a total ban and all I want from you is confirmation that the minister at that time was of the view that there could be some advertising.

A- The minister was formulating his policy position at this time, indicating that the proposal was not satisfactory. He did not -- or I cannot define for you a moment in time when the minister had determined that a legislated prohibition was necessary.

Q- Well, at page three (3) of that letter...

A- M'hm.

Q- ... he concludes by saying:

"I am attaching details of the approach I favour."

A- M'hm.

Q- And those details would be in the document which is attached, entitled "National Health and Welfare Objectives with respect to Tobacco Advertising Information"? Those would be the details the minister favored at that time, would they?

A- It would -- certainly this seems to suggest that the minister is attaching these as his preferred options, yes.

Q- Now, Dr. Liston, you were very involved in negotiations. The minister mandated you to carry the ball for the department and talk to the industry. You were clearly aware of this letter, were you not?

A- I was aware that this letter was requested by the minister from us, yes.

Q- Right. So this was prepared by your department for the minister?

A- Yes, it was.

Q- And you prepared that attachment to the letter as the details which you understood your minister to prefer, did you not?

A- Yes.

Q- Okay. And if we look at page three (3) of those details which your minister preferred in December -- sorry, October -- ninth (9th) of October eighty-six ('86), we see that the first principle was going to be:

"No form of tobacco advertising, promotion or sponsorship is allowed, except as permitted by a given set of rules."

So you'll confirm to us, I think, Doctor, that the minister saw that some advertising would be allowed?

A- Yes.

Q- Yes. And you saw that those rules at page four (4), at the bottom of page four (4), having to do with lifestyle advertising, the minister preferred that the direct approach would be:

"To limit tobacco product advertising, promotion and sponsorship materials to the brand name, the brand logo, a picture of the tobacco product or its package against a plain background, along with the required health information."

So you agree that the minister saw that it was going to be possible at least to advertise the package?

A- Yes.

Q- Yes. Do you agree with me, Doctor, while you're there, that the minister also agreed that there ought to be a package? You weren't going to make all the packages black and white, were you?

A- No, that's correct.

Q- No. You were going to leave tobacco manufacturers their logo for each brand?

A- There was a brand logo that was permitted, yes.

Q- Right. And if we go to Appendix 1, first page of Appendix 1, where we see "Health Hazard Warnings", Doctor, the second sentence reads:

"Similarly, a warning would appear on each advertisement and promotional item."

This is further confirmation, is it not, Doctor, that your minister preferred at that time to have advertisements of one kind or another?

A- Yes.

Q- Indeed, did he not prefer to use advertisements as a vehicle for the health message?

A- Well, the health message was a means to try and counteract the -- whatever advertising or promotion that might exist and it was an offset, if I may so describe it, in billboard advertising, for example. The health message would be on it to help convey to consumers information about the product and the potential impact that it could have on their health.

Q- I see. I'm not sure what the difference is. At any rate, do you confirm that the minister had that preference which is described there?

A- Yes.

Q- Yes. And if we look at the first sentence in that same paragraph:

"In addition, a warning would appear in English and French and occupy 30% of the largest display panel on packages and carton wrappers."

Can you tell me what was in the mind of your department and the people writing that at that time, because most cigarette packages have two (2) largest panels? Was it in your mind that the warning should occupy thirty percent (30%) of one of them or thirty percent (30%) of both of them?

A- It was -- it was intended that the package have on its main panel, and there are two (2), that it would be thirty percent (30%) of that, as opposed to thirty percent (30%) of one of the two.

Q- What do you mean? Thirty percent (30%) of both of them?

A- Yes.

Q- And that's what that sentence is meant to mean?

A- That is my understanding of it, yes.

Q- Well, what I've asked you is what the department actually had in its mind at that time.

Me EVRAIRE:

I believe he answered that.

Me POTTER:

Well, Dr. Liston has been very careful to say: "That's my understanding of the sentence".

A- Certainly we were recommending to the minister that there were two (2) principal display panels, that the warnings would be on both of those and that they would occupy thirty percent (30%) of the total space of that

panel.

Q- I see. Well, I'd like to produce that, Doctor, then as Exhibit ITL-58. It is a letter of October nine (9) with appendices.

5 Now, Doctor, I'm showing you a letter dated October twenty-nine (29), nineteen eighty-six (1986) from the C.T.M.C., Mr. McDonald, to Mr. Epp, in which Mr. McDonald concludes by asking for an extension of a deadline and asking to be able to respond to the October
10 nine (9) letter by, at the latest, December fifteen (15).

Do you remember that request being made?

A- Yes, sir, I do.

Q- And do you agree with the author of that letter that the
15 suggestions contained in the exhibit we've just looked at, ITL-58, were rather far-reaching and demanding and would require some thought before replying to them?

A- It was a topic that had been broached, I guess, for the first time in nineteen seventy-two (1972), so that there
20 was ample warning that a legislated option was one that had remained on the government's back burner, as it were, for some goodly number of years.

Q- Dr. Liston, the letter, ITL-58, is a response to the C.T.M.'s brief.

25 A- Yes.

Q- And it is a statement of the minister's preferences.

A- Yes.

Q- The preferences for a voluntary program, not a
legislated option, is that not correct? It is his
5 preferences regarding the voluntary program he would
have accepted.

A- Sorry. Come back again with that. The prior...

Q- The October nine (9), nineteen eighty-six (1986) letter
...

10 A- M'hm.

Q- ...does not say that the minister insists on the
legislated option, does it? It says if there's going to
be a voluntary option, it must be for more than the
C.T.M.C. has so far offered, and here are my
15 preferences. Don't you agree?

Let's get at it this way, Dr. Liston. The letter
concludes -- Mr. Epp's letter -- ITL-58 ...

A- M'hm.

Q- ... concludes by saying:

20 "Please let me have your response by October
31, 1986."

A- The letter concludes and suggests a date: October
thirty-first (31st), yes, that's correct.

Q- "Please let me have your response by October
25 31, 1986."

A- Yes.

Q- Isn't it correct to see this as part of the negotiations?

A- Yes.

5 Q- Isn't that right?

A- Yes.

Q- Negotiations in order to see if we can get a voluntary system rather than a legislated one?

A- Yes.

10 Q- Yes. Okay. And now we have this letter from the C.T.M.C. saying: "my goodness, October 31 is rather soon, because these preferences of the minister go rather far." You remember discussing that letter within your department?

15 Me EVRAIRE:

Well, excuse me, that was a two (2) parter. The first part asks the witness to interpret the letter, which speaks for itself and the second part I have no objection to.

20 Me POTTER:

I'm sorry.

Q- I interpreted the letter, which speaks for itself, but I'm asking Dr. Liston the question whether he remembers discussing this C.T.M.C. request within his department.

25 A- Yes.

Q- Yes. And do you agree with the third paragraph of that letter, Dr. Liston, that the scope and nature of the minister's comments went further than anything he'd asked for previously?

5 A- Certainly it was a clear indication from the minister that he wanted more control over advertising and promotion, yes.

Q- Yes. So it's not quite right to say that everything that appears in the minister's letter had been discussed since nineteen seventy-two (1972)?

10 A- No, I...

Q- No.

A- Nor did I say that.

Q- No, no, I just want to be clear about what we are saying. Some of the things in the minister's letter must have come as a big surprise to the industry, don't you agree?

15 A- No, I can't really characterize it as saying it would be a big surprise where there was not some appreciation that our objectives were to try and reduce tobacco smoking, they were to try and provide the consumer with more information and it was to try and preclude promotion of a lifestyle nature. Those objectives, in the main, were known to the tobacco industry.

25 The details of the recommendation and so on,

perhaps were not ...

Q- M'hm.

A- ... but I would not call it a big surprise, no.

Q- No. Not a big surprise that the minister preferred to
5 see advertising limited to advertising of the package
only?

A- I would not call that a big surprise.

Q- No. All right. In any event, the C.T.M.C. asked for
the postponement until December fifteen (15), a question
10 of six (6) weeks, and if we turn the page we see Mr.
Epp's reply of November two (2), nineteen eighty-six
(1986).

This letter, My Lord, is already an exhibit. It is
ITL-27-39, although it bears a different page number at
15 the bottom, page four eight three four (4834) rather
than eight five two (852).

THE COURT:

Tab what?

Me POTTER:

20 ITL-27, Tab 39.

Q- And you were aware, were you, Dr. Liston, that the
request for an extension was rejected by Mr. Epp?

A- Yes, I was aware of it.

Q- Could we produce these two (2) letters together then as
25 Exhibit ITL...

THE COURT:

The first letter too has been filed, hasn't it?

Me POTTER:

I must admit, My Lord, that I thought it had as I read
and I've checked and looked and hunted for it and don't
find it, so out of caution I'll produce it again, if
need be.

THE COURT:

So ITL-59.

Me POTTER:

Q- And I'm showing you now a few exchanges, Dr. Liston.
First of all, a telex. Astonishing, isn't it, Dr.
Liston, how fast things go? We don't even think of
telexes anymore, but here's a telex, nineteen eighty-six
(1986), with page number four nine nine eight (4998) in
which Mr. McDonald of the C.T.M.C. responds to Mr. Epp's
telex of November three (3), and he concludes in the
bottom paragraph:

"In spite of all the difficulties ..."

-- et cetera, et cetera --

"... we would like to have time to respond by
the end of November."

That is to say a matter of about three and a half (3½)
weeks. Do you remember that request?

A- I remember this exchange of telexes and correspondence,

yes.

Q- That's right. And if we turn the page, we see at
document with page number seventeen five six six (17566)
a document which was -- the original of which was
5 apparently signed by you, Dr. Liston. Do you remember
signing this, this memorandum to the minister?

A- Yes.

Q- Signing it for Maureen Law?

A- That's correct.

10 Q- And it bears the stamp of approval of the minister?

A- I can't tell from here.

Q- Well, do you...

A- My copy. If you're referring to the "Approved" and the
signature block, there is nothing legible here at all.

15 Q- I see. Well, do you remember whether the minister
followed this advice? Well, never mind, Dr. Liston.
We'll get to it as we see the further correspondence.
You agree with me however, that the document which you
drafted for Maureen Law to the attention -- to the
20 intention of the minister was that there ought to be a
response saying: "Of course, if you want to write to us,
we'll read your letter but we're not waiting"? Do you
agree that that was the message you intended to give?

A- Yes.

25 Q- Yes. And if we turn the page, this is an outgoing telex

message bearing Attorney General page number seventeen
five six seven (17567). You can see that that
recommendation was in fact followed, can you not?

A- Are we talking about 4997 here?

5 Q- Oh, I'm sorry. Yes, it is 4997.

A- Yes, this was prepared and sent to the minister's
attention.

Q- And in fact the -- there was a similar telex which went
out to Mr. McDonald, was there not?

10 A- There was a copy of it.

Q- Yes. Well, could we produce these documents then as
ITL-60? This is an exchange of telexes between the
C.T.M.C. and the minister, including recommended
responses for the minister regarding a possible
15 extension of a deadline.

THE COURT:

That's a brief description.

Me POTTER:

It's a brief description.

20 Q- Now, Dr. Liston, as of the time of those exchanges, when
the minister was saying: "That's it, I'm not waiting
anymore. You've asked for another delay, I'm not giving
it to you. I'm moving ahead. I'm going to talk to my
cabinet colleagues", at that time he had not told you,
25 had he, that he was thinking of a total ban of

advertising?

A- At the time the minister was indicating that he wished to proceed to obtain -- to discuss with his cabinet colleagues or obtain a policy approval for proceeding with a piece of legislation.

Q- With a piece of legislation, but I'm asking you about the ban. At that time, the minister was still thinking of his preferred details, was he not?

A- I believe the minister was looking at a variety of options at that time. I think the issue was open.

Q- The issue was open. He suddenly didn't have any preferences at all?

A- No. When one consults with an industry, you leave the avenue or the channel of communication open. He may have a preferred option, a preferred position, but it does not mean that it is fruitless to entertain any further discussion.

Q- I see. I'd like to show you now, Dr. Liston, a document which is already an exhibit. It is a more voluminous exhibit, Dr. Liston, and if you want to see the entire volume of the exhibit, please let me know. This is Exhibit ITL-27-41 and it is a memorandum dated November seventeen (17), nineteen eighty-six (1986), to which was attached three (3) speeches, one of them in two (2) languages.

Do you need to see the speeches in order to remember what we're talking about?

5 A- I'm aware of the circumstances. I don't know what the detail is in all three (3) speeches. It depends on what...

Q- Now, okay. And you're aware of it, because of course you received a copy of ITL-27-41?

A- Again, you -- I'm at your mercy, because I don't have an ITL designation. I don't know what it is.

10 Q- I'm sorry. The document I've just shown you.

THE COURT:

Which is the document dated...

A- On the top right-hand.

Me EVRAIRE:

15 ITL-27(41).

THE COURT:

That's the document November seventeen (17), nineteen eighty-six (1986), from Beavis to Gowanlock.

A- Yes. To...

20 Me POTTER:

Q- And you received a copy of that memorandum; did you not?

A- Yes, I did. Yes.

Q- And you received with it copies of the three (3) speeches?

25 A- Yes.

Q- And you knew that those were speeches prepared by your department for members of the Conservative caucus?

A- Yes.

Q- And you knew that they were not speeches for your minister or for cabinet members or for Mr. Collishaw. You knew that they were for various members of the Conservative caucus?

A- My interpretation of this is that these speeches were prepared for reading by MPs that would be called upon to respond or to talk about Bill C-204.

Q- Right. But it didn't have to be a cabinet minister, did it. It could have been any member ...

A- Well...

Q- ... of the Conservative caucus?

A- That's correct, yes.

Q- And this is dated November seventeen (17), nineteen eighty-six (1986), you will confirm to us as Mr. Collishaw has that within your Department C-204 was receiving some attention, it was often discussed within your department?

A- Yes, it was.

Q- Yes. And you told Mr. Irving earlier this morning that the minister's reaction was that he'd rather, if there was going to be an initiative, that it be his?

A- The minister had indicated that he felt that tobacco

legislation, health legislation, that it would be appropriate for he, as the health minister, to have the relevant piece of legislation.

Q- And those speeches were prepared at his direction?

5 A- His office's direction, yes.

Q- Yes. Dr. Liston, I'm now showing you a document dated November twenty-six (26), nineteen eighty-six (1986), which is signed by you. It is a memorandum from yourself to Mr. Beavis.

10 You confirm that this is your document?

A- It is.

Q- Now, you remember the discussion this morning about Options 1, 2 and 3?

A- Yes.

15 Q- Right. Well, here in this document we read:

"I have reviewed..."

-- something or other -- we're not allowed to see what it is you reviewed. And please do not tell us!

"...and I am pleased to see that most of

20 someone's concerns have been addressed."

What are those initials?

A- I'm sorry. I can't make them out, sir.

Q- Well. ...

A- M.P. something or other.

25 Q- Well, I'm wondering if you can remember who you might

legislation, health legislation, that it would be appropriate for he, as the health minister, to have the relevant piece of legislation.

Q- And those speeches were prepared at his direction?

5 A- His office's direction, yes.

Q- Yes. Dr. Liston, I'm now showing you a document dated November twenty-six (26), nineteen eighty-six (1986), which is signed by you. It is a memorandum from yourself to Mr. Beavis.

10 You confirm that this is your document?

A- It is.

Q- Now, you remember the discussion this morning about Options 1, 2 and 3?

A- Yes.

15 Q- Right. Well, here in this document we read:

"I have reviewed..."

-- something or other -- we're not allowed to see what it is you reviewed. And please do not tell us!

"...and I am pleased to see that most of

20 someone's concerns have been addressed."

What are those initials?

A- I'm sorry. I can't make them out, sir.

Q- Well. ..

A- M.P. something or other.

25 Q- Well, I'm wondering if you can remember who you might

have been talking about?

A- No.

Me EVRAIRE:

Might I suggest H.P.B.?

5 Me POTTER:

Q- Is there an H.P.B.?

A- Yes. The Health Protection Branch.

Q- Health Protection Branch. It goes on:

10 "As you know, I was interested in seeing a
bare bones legislation only ..."

-- I'm sorry --

"... a bare bones legislation only option
included."

15 I take it that would have been an option on top of
Option 1, 2 and 3?

A- I'm sorry. I'm having difficulty working my way through
here.

May I have the question again, please?

20 Q- I take it that the bare bones legislation only option
which you mentioned there would have been an option
beyond Option 1, 2 and 3?

A- Or a variation of it.

Q- Or a variation. And what did you have in mind when you
wrote "bare bones" legislation?

25 A- One in which authority -- authority is given without a

great elaboration of the -- of the methodologies and modalities that need to be followed.

Q- Would you say regulation-making power?

A- If you wish.

5 Q- Yes.

A- But sometimes, depending on how the Act may be framed, it can have some elements of what might be conceived of as regulations incorporated into the legislation itself.

10 Q- But by "bare bones" you meant legislation authorizing the minister to act?

A- Yes.

Q- Yes. You write:

15 "However, I am assured by Dr. Thompson that the minister's office and P.C.O. view Option 3 as a 2 part option."

Does this refresh your memory as to what Option 3 was?

A- No, sir, it doesn't provide me with or it doesn't bring back the details of Option 3.

Q- No.

20 THE COURT:

That is a legislative framework or legislative with new -- some word there.

Me POTTER:

Program initiatives.

25

THE COURT:

Program initiatives. That is -- so.

Me POTTER:

Q- Well, you wrote this, Dr. Liston, can you tell us
5 whether this Option 3 is the same as the recommended
Option 3 which Mr. Irving pointed out to you this
morning?

A- It refers to a third option, the same one that was
alluded to in our discussion this morning.

10 Q- And you know that this Option 3 is the same as that
other Option 3?

A- Not from personal knowledge at this time. I'd have to
go back into the file and study it.

Q- And before coming to testify in this case, did you
15 review the file to check all these correspondences and
the memoranda and so on?

A- I did not have an opportunity to review or the time to
review all of the files.

Q- Well, can we produce this then as Exhibit ITL-61?

20 Now I am showing you a document which has the
handwritten date December nine (9), nineteen eighty-six
(1986) on the top right. It bears Attorney General's
page seventeen five nine six (17596) and it lists in
three (3) columns: N.H.W October ninth (9th), C.T.M.C.
25 June thirty (30) and C.T.M.C. November twenty-eight

(28). Do I take it, Dr. Liston, that the C.T.M.C. wrote on June thirty (30) and then wrote again on November twenty-eight (28)?

24/0051 A- It would seem that this refers to two (2) proposals.

5 Q- Right. And the far left column, the National Health and Welfare, do you agree with me that those are the minister's preferences in ITL-58?

A- It would seem so, yes.

Q- Well, have you seen this document before?

10 A- No.

Q- You haven't?

A- No, I haven't.

Q- Well, are you able to confirm to us that as of December nineteen eighty-six (1986) the departmental position was the same as had been expressed in the October nine (9) letter?

15

A- The date that is put here reflects a position which is the same as...

Q- I'm just asking you whether, as of December eighty-six ('86), the departmental position had become either more stringent or less stringent than the position expressed in ITL-58, the October nine (9), nineteen eighty-six (1986) letter, or whether this left-hand column is still an indication of the departmental position at that time?

25 A- This would seem to be an analysis document of the

various elements and the left-hand column, the Health and Welfare one, seems to reflect the positions that had been outlined on the so-called minister's preferred option, yes.

5 Q- That wasn't my question.

A- It was.

Q- My question is by the time we get to December...

A- M'hm.

Q- ... has that position changed?

10 A- Because of this document?

Q- No, that's not...

A- Oh.

Q- This document seems to be written by someone in December. Because you don't remember having seen it, because you're not the author, I am forced to ask you, 15 Doctor, whether in December, eighty-six ('86), this left-hand column still avails or is it simply a recapitulation of what used to be the position? What was the departmental position in mid-December, 20 eighty-six ('86)? Was it the same as had been on October nine (9) or had it changed?

A- My best recollection was that we were proceeding with the development of the policy document or of the proposed legislation and I think that the majority of 25 these still reflected the underlying attributes that we

were interested in.

Q- Good. And can you tell me, Doctor, whether Point number 4, that print advertising would be permitted, was still in the document which you were then preparing?

5 Me EVRAIRE:

Excuse me. Is my friend asking the witness to reveal what was in a cabinet submission or memorandum?

Me POTTER:

Well, Dr. Liston has said that the majority of these points were still part of the departmental position. I am asking if Number 4 was.

Me EVRAIRE:

I prefer that question.

Me POTTER:

15 Q- Well, was Number 4 still in there, Doctor? Doctor, can we get at it another way?

A- Please.

Q- When you say that in December you were off busy preparing documents that might go to cabinet...

20 A- M'hm.

Q- ... okay, was it a total ban you were talking about or was there going to be some advertising?

Me EVRAIRE:

Well, My Lord, I have some difficulty with that because it's asking the witness to reveal, possibly reveal what

was -- has subsequently become the subject matter of a certificate. Might I suggest my friends, so that we move on, address it yet another way? For example, was it still the public policy of the department as stated in Number 4, something like that, because if we're getting into what was being prepared then...

THE COURT:

That's been asked but we haven't got an answer from the witness.

Me EVRAIRE:

Well, the witness is trying to rack his brain to recall week by week what changed, but I think my friend understands what I'm saying. If we're getting into what was being prepared, then we're getting into certificate questions again.

Me POTTER:

Q- Well, let's put it this way, Doctor. Had you advised anyone outside your department...

A- No.

Q- ... that Number 4 was no longer the departmental policy?

A- No, we had not.

Q- No.

Q- Had you advised anyone outside your department that Number 5 was no longer the departmental policy?

A- No, I don't believe so.

Q- And what about Number 6?

A- No.

Q- No. Well, I'd like to produce this then, My Lord, as
ITL-62.

5 Now, My Lord, if we are following in chronological
order, we would come now to the two (2) briefings to the
minister which are RJR-46 and 48. Actually in reverse
order, RJR-48 and 46, the latter one being December
eighteen (18), nineteen eighty-six (1986).

10 Dr. Liston, so I'm not leaving you in the dark, the
latter one, December eighteen (18), nineteen eighty-six
(1986), which is RJR-46, is the document which Mr.
Irving showed you, the briefing from Mr. Collishaw.

A- M'hm.

15 Q- Questions were asked about that earlier and I don't
propose to go any further. But we then have a document
which I'll show you now, entitled: "Briefing Note," and
it is dated January sixth (6th), nineteen eighty-seven
(1987) on its page four (4). It is -- it bears the
20 legend "secret" on the top right-hand corner and has an
excision on page one (1).

 My Lord, this document has already been discussed
before you at Volume XXIII, page thirty-five thirty-nine
(3539) to thirty-five forty-three (3543).

25

THE COURT:

Thirty-five....

Me POTTER:

5 Thirty-nine to thirty-five forty-three (3543) and at
page thirty-five fifty-four (3554). And the discussion
at that time was not in order to produce this as an
exhibit, but to point out that this document does not
appear on the certificate of the minister.

10 Q- Now, are you -- do you know about this document, Dr.
Liston?

A- It is a briefing note that was prepared by Policy
Planning and Information.

Q- Well, is that all. Do you remember seeing it? Do you
remember discussing it?

15 A- I remember discussing some aspects of it, most probably
-- I remember discussing the health warnings and the
logo, et cetera.

20 Q- And the logo, et cetera. And in the point number one
(1) where we see that the C.T.M.C. states that the
principle:

"No form of advertising except as permitted by
a given set of rules is arbitrary, unfair and
may be illegal."

25 Your departmental assessment of that is blacked out, but
can you tell us, Doctor, when it was decided that the

department would not go with its previous suggestion of banning all advertising except the advertising it would allow?

5 A- We had originally stipulated that advertising would not be permitted except under a set of rules. That was the original statement.

Now, your question to me, sir, is?

10 Q- Well, that what you have just stated was consistently the position of your department over many many months of negotiations...

A- Yes.

15 Q- ...notwithstanding that the C.T.M.C. always took an opposing view. Your department consistently -- and the documents say this -- consistently took the position that we'll ban everything except things that we will allow by specific rules.

A- M'hm.

Q- When was it your department abandoned that position?

20 A- During the formulation of the legislation as we developed some of the options. It was during this period that the ban on advertising was -- how shall I describe it -- was -- became the preferred option of the minister.

25 Q- Well, I want to be fair to you, Dr. Liston, that's clearly not correct on the face of this document. If

you go to page four (4), you can see in the last paragraph a recommendation from Policy Planning and Information:

"The minister may wish to proceed with the introduction of legislation which will enable him to issue regulations controlling the advertising and promotion of tobacco products."

You agree with me that it was not a question then of banning advertising but of allowing the minister to regulate it?

26/0032 A- Well, it depends on the emphasis or the significance that you give to the term "controlling".

Q- Well, in your...

15 A- I mean, in a regulatory...

Q- ... in your circles?

A- In a regulatory program, we control the advertising of prescription drugs so that they -- you may not advertise them to the general public. That's a form...

20 Q- You allow advertising to doctors?

A- But we allow it to doctors.

Q- That's right. To people who can make the choice, who are doctors, but within your circles, when you talk about regulations controlling something, does that include, in your mind, an outright ban?

25

A- That is part of it. That's within the spectrum of things that -- of control that one could exercise.

Q- I see. And we see attached to this document is another copy of ITL-62, but this time with a few extras at the bottom. In fact, there are more items being discussed here and there are some extra ones at the bottom. Do you remember this document?

A- Are we on page...

Q- Seventeen six one four (17614).

A- Referring to the advertising billboards within two hundred (200) meters of schools?

Q- Now, I'm just asking you if you remember this document, this version of that document which appears to be an addendum to the briefing note of January sixth (6th), eighty-seven ('87)?

A- Yes, it forms part of the same document. Are you asking me do I have a recollection of its full contents? No, I don't.

Q- No, no, I'm not. I'm not going to quiz you on its full contents, but once again I'm going to ask you, as of January sixth (6th), eighty-seven ('87), whether you had told anyone outside the department that Numbers 4, 5 and 6 were no longer departmental policy.

A- Not -- no. This -- these points, 4, 5 and 6, were being discussed internally.

Q- Yes, still being discussed internally as of January?

A- I believe so, yes.

Q- Yes. Thank you. Well, let's produce this document,
then, as ITL-63. And the next document is dated May --
5 May one (1), nineteen eighty-seven (1987), that's to say
some four (4) months after the last document we've just
looked at, and this is a letter addressed to -- this
happens to be a letter addressed to Mr. Fennell,
president of Rothmans Benson & Hedges, but you remember,
10 do you not, Dr. Liston, that identical letters were sent
to all the presidents and indeed to the president of the
C.T.M.C.?

A- They seem to be attached here, yes.

Q- Well, what I'm asking you, Doctor, is you were aware of
15 this letter going to the presidents, were you not?

A- Yes, at the time that this was prepared, it would be
prepared through my organization.

Q- Through your organization. And when we go to the second
page of that letter, we can see that the minister quite
20 courteously is sending, on May one (1) nineteen
eighty-seven (1987), to the presidents, a copy of the
Bill C-51, is that right?

A- I don't know if that's the attachment. It may very well
be.

25 Q- Well, the Tobacco Products Control Act, the bill called

that, that people were talking about in May of nineteen eighty-seven (1987), is that not the bill which became C-51?

A- Yes, it was.

5 Q- Yes.

A- I'm alluding to the last -- here, where it says:

"I look forward to the coming parliamentary debate on the proposed Tobacco Products Control Act."

10 It does not refer to copy attached, et cetera.

Q- At the top paragraph of that page.

A- Ah, yes. Okay, that's fine.

Q- So he had the courtesy of sending a copy?

A- Yes.

15 Q- Now my question to you, Dr. Liston. Between January seventh (7th), the date of the last document that you and I looked at, and this letter, what advice was given to the tobacco manufacturers that the minister had decided to abandon Points 4, 5, 6 and move to an outright ban? Do you remember any advice?

20 A- No, I have no -- no recollection of the minister having -- or of contact with the C.T.M.C. during this period.

Q- Thank you. Well, let's file this exhibit then as ITL-63. 64, I beg your pardon. And to be clear about
25 it, Dr. Liston, you remember no contacts at all during

that period?

A- I have no recollection of such.

Q- No.

Me POTTER:

5 Do we yet have an answer to Mr. Irving's request from
this morning?

Me EVRAIRE:

Well, I have the answer. Perhaps I could let the
witness...

10 THE COURT:

You can look at it.

Me EVRAIRE:

... look at it and then give the answer.

THE COURT:

15 Do you want me to move out?

Me EVRAIRE:

Non non, ça va prendre deux (2) secondes.

A- The two (2) periodicals referred to, it's the Globe
Magazine and the Star Magazine.

20 THE COURT:

Q- Just a minute. I'll find -- which one?

A- The Globe Magazine and the Star Magazine. They were
advised on March the ninth (9th).

Me IRVING:

25 Q- What precisely were they advised of, Dr. Liston?

A- That their operations did, in the view of the department, not contravene, were not a contravention of Section 4 of the Tobacco Products Control Act.

Q- Can you tell me where those publications are located?

5 Is that the Globe & Mail...

Me BAKER:

No.

A- No.

Me IRVING:

10 Q- No?

A- No, no. These are...

Q- I don't mean the newspaper. Is it published by the same...

A- Oh, no.

15 Me BAKER:

I'm sorry that we're answering, My Lord, but I have a feeling that Dr. Liston doesn't know and...

Me EVRAIRE:

20 If you saw the Globe, you would know that it has nothing to do with the Globe & Mail.

Me BAKER:

And if you had seen the smile on Mr. Irving's face, you would have known that he knew that as well.

Me IRVING:

25 Q- Do you know where the two (2) are located?

A- My best recollection was that they were very small publications and they had -- they were published in the central -- call it Ontario, U.S. area of the country, as opposed to the West or East coast. They were central Canada publications.

Q- And were they advised in writing, Dr. Liston?

A- I can't answer that detail for you, no.

Q- Well, again I hesitate to...

A- I mean, I...

Q- ... ask another undertaking, but if there is a written communication to those publications, I'd like to have it made part of the record.

Me EVRAIRE:

Yes.

Me IRVING:

Perhaps without any undertaking to bring Dr. Liston back, we could agree now that the letter or letters will be produced as an RJR exhibit and we could give it a number now, just to reserve the number.

Me EVRAIRE:

Let's wait and confirm that there is one.

Me IRVING:

I think the witness said yes.

Me BAKER:

What's the point of giving something a number that's not

on the table?

Me EVRAIRE:

We will undertake to provide whatever letters there may be Thursday morning when we resume and thank you for the undertaking that Dr. Liston need not return.

Me IRVING:

No, no, there'll be no need to bring Dr. Liston back.

Me POTTER:

I hadn't quite finished, My Lord. I see it's three o two (3H02), I ask everyone's indulgence for another three (3) or four (4) minutes.

Q- Now, of course, the question of those tabloids came up, Dr. Liston, because of Exhibit RJR-223. And you have it before you, it's your memo December thirteen (13), nineteen eighty-eight (1988). About a year and a half (1½) ago.

Do I take it, Dr. Liston, that the amendments which appear on the situation report attached to that memorandum are the amendments recommended by your department?

A- This is a -- the advice we had on the amendments that could be or were contemplated, using the omnibus bill or miscellaneous statutes.

Q- Well, I understand, but when the document says in the middle, "it is proposed that section four (4)," and

higher up, "it is proposed that section eight (8)" --
who is it doing the proposing? Is it your department?

A- Yes, it would be our legal counsel, our department.

Q- Right. So those two (2) amendments proposed there are
5 amendments recommended by your department; is that
right?

A- M'hm. Yes.

Q- Yes. Okay. Now, the papers and tubes. We've talked
about the tabloids, and the document will speak for
10 itself on the tabloids, but the papers and tubes. Do I
understand this document correctly, Dr. Liston, that
there have been, in the past, papers, cigarette papers
and cigarette tubes for sale separately from tobacco?

A- In the past, yes.

Q- And that those papers and tubes have, over many years,
15 carried trademarks also associated with cigarettes? For
example, can you get Player's papers?

A- I would assume so, yes.

Q- All right. So the answer is yes?

20 A- I haven't seen then, but I presume so, yes.

Q- Well, no, you wrote this memorandum, Dr. Liston. You
understand that there are papers and tubes which have
carried trademarks also associated with cigarettes.

A- I think it says here: would be permitted to carry the
25 trademark.

Q- Well, would be permitted because you find out that with the drafting of the T.P.C.A. the way it is now, suddenly that's no longer allowed. But that's not my question.

5 My question is whether you are aware that there have been for many years papers and tubes sold with trademarks which are also associated with cigarettes?

Dr. Liston?

A- Yes.

Q- Yes, okay. And in fact, isn't that the very anomaly
10 that you're talking about, that it seems a little silly to insist that the trademark be taken off those, that's why you used the word anomaly; is it not?

A- It is an anomaly, yes.

Q- Yes. And that's why you used the word "anomaly," isn't
15 it? Because you think it doesn't make any sense?

A- It's a piece of housekeeping that we need ...

Q- Right.

A- ...to try and tidy.

Q- And can you tell us, Dr. Liston, whether the same kind
20 of assurance which was given to the two (2) tabloids, that they could safely go ahead and publish and that they would not be prosecuted, was that same kind of assurance given to tobacco manufacturers, that they could safely market tubes and papers bearing tobacco
25 product trademarks and not be prosecuted?

A- In discussions with Mr. Neville, he was apprised of the fact that we would be recommending within the Health Protection Branch that allowance for that would be forthcoming.

5 Q- Well, is that -- what is the allowance? The amendment?

A- The amendment, yes.

Q- Right. Well, my question was: was assurance given that there would be no prosecution in the meantime? Just as there was assurance given to the tabloids.

10 Do you know of...

A- There was no intention of prosecution because there was an item of discussion and I think from those discussions it could be very easily inferred that it was not our intention to define and go forward with any prosecution action in this area.

15

Q- So I take it the assurance was not given, but you invite people to infer it?

A- Yes.

Q- Okay. Now, one final element, Dr. Liston, before we sit down and call it a day.

20

You are aware, are you not, that your department proposes to amend the regulations under the T.P.C.A.?

Me EVRAIRE:

Objection, My Lord. This is not a matter raised in the pleadings in this action at all. My friends have raised

25

the regulatory-making power under the Act, but have not raised the regulations specifically and I object to the question on that basis.

Me POTTER:

5 I think that we shall see, My Lord, that it is very relevant because of the changes which are proposed and of the work which did or did not go into preparing for those changes and we might be able to compare that work to the work which did or did not go into preparing the requirements in the T.P.C.A.

10 THE COURT:

I don't find -- quite frankly, I don't understand what you're saying.

Me POTTER:

15 Well, I've had to phrase it that way so as to not to...

THE COURT:

It's not the clearest statement I heard of the day.

Me POTTER:

20 Well, with the witness here, I didn't want to be too direct about it.

THE COURT:

Well, do you want him out?

Me POTTER:

25 I'll just simply be direct. I'm sure it won't influence Dr. Liston.

5 The new regulations are exceedingly demanding on
the question of health messages and I will want to ask
Dr. Liston just how much work was done to find out how
necessary it was to become so demanding and it will -- I
will ask the Court to draw the inference from the degree
of work which was done in preparing for those demanding
regulations that there is an attitude in the department
which has brought about the legislation which you are
considering, without even considering whether the thing
10 is necessary or not, and I will submit that that goes
directly to the justification of this legislation, that
just as there was no work done to find out whether the
legislation was necessary, there was no work done either
to determine whether it was necessary to make it even
15 more Draconian.

THE COURT:

20 Well, I'm not seized with the new regulations or the
proposed regulations. I fail to see any relationship
whatsoever with the main action, quite frankly. What
you're saying is that the challenged legislation, which
I have before me, has not been carefully drafted and
that may be part of your argument and so on, but how
could I -- how could I compare that to proposed -- new
proposed regulations under the same Act? I just don't
25 see what you mean.

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Me POTTER:

Well, I'll abide by your view on that, My Lord, subject to Mr. Irving's rule -- thoughts.

Me EVRAIRE:

5 I thought my friend, Mr. Irving, was finished with this witness.

Me IRVING:

Well, I think I'm still part of the case, Mr. Evraire, and...

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Me EVRAIRE:

Well, let me...

THE COURT:

I'll hear him anyways.

Me EVRAIRE:

15 Well, what can I say.

Me IRVING:

My Lord, you will recall -- you will recall, My Lord, that in the action which was brought by RJR-Macdonald, we complained that the enabling section of the Act which permits the government to make regulations, prescribing
20 in great detail what appears on packages and so on, infringed freedom of expression under the Canadian Charter. Now, we now know and the Court knows that there are regulations which are in force and the
25 companies, of course, are abiding by those regulations.

We also know now that new and much more extensive regulations are proposed, and if that is so, then enlightening the Court on the nature of those new regulations and the steps which went into it will serve to illustrate the point which we were making and which I referred to in opening the case, that that enabling power is indeed an infringement of freedom of expression and that -- and you'll be simply seeing another illustration of how it can work, so it would serve to emphasize the point we were making, that in giving itself total control over what is to appear on the packages as illustrated by what is now proposed, that the government has indeed infringed freedom of expression.

In my submission, it would be admissible on that basis. I don't believe it could take terribly long but I would respectfully submit it is relevant.

Me EVRAIRE:

My Lord, I...

Me IRVING:

And of course, it's not referred to in the pleadings because there were no proposed new regulations at the time of the pleadings.

THE COURT:

Have the new regulations been adopted?

Me EVRAIRE:

They have not even been published in the Canada Gazette.

I have two (2) words for my friends. They're both
polite words. First is "irrelevant". They have not
5 raised this in their pleadings. Secondly, it's
premature. I understood Your Lordship had ruled in any
event.

THE COURT:

I fail to see how these exchanges between the industry
10 and the government, or absence of exchanges, be it as it
may, something which is proposed not even anywhere, I
mean, it's just -- no, I sustain the objection.

Me POTTER:

We abide by the ruling, thank you.

15 Me EVRAIRE:

We will, as I say, undertake, if there were letters that
were transmitted to the Globe and the Star, to provide
those Thursday morning when we resume with the next
witness. There is no re-examination in any event.

20 Me IRVING:

My Lord, may I then raise a very brief housekeeping
matter? I understand that the next witness is Mr.
Megarry, the publisher of the Globe & Mail, and that he
is not available until Thursday, so that will have -- I
25 understand from Mr. Baker that Mr. Megarry is otherwise

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occupied tomorrow. I had mentioned earlier the dinner for retiring Chief Justice of the Supreme Court of Canada which is tomorrow evening in Ottawa. I will be going to that dinner. Mr. Potter in fact is going to it, and I had asked if the Court would mind sitting a bit later on Thursday morning, because we can't get back on Wednesday evening.

I understand from Mr. Baker that his direct examination of Mr. Megarry won't be very long. Neither will our cross-examination, but...

THE COURT:

Do we know the subject of his testimony?

Me IRVING:

No.

Me POTTER:

No, we don't, My Lord.

THE COURT:

We wouldn't like anybody to get caught off guard.

Me BAKER:

Nobody will be caught off guard, My Lord. I have faxed my friends, about ten (10) days or so ago, a copy of an editorial that was published in the Globe in nineteen eighty-six (1986).

THE COURT:

Oh, it's about that?

Me BAKER:

In part, yes, but there is certainly...

Me IRVING:

It's the "in part"...

5 Me BAKER:

He's not testifying as an expert, that is clear, and it is because I didn't want them to be able to assert that they were being caught off guard that I did send them the editorial. So I don't think there will be any surprises on Thursday.

10

THE COURT:

Okay, but is that anything to do with the confidentiality issues that were raised at the beginning of the trial?

15 Me BAKER:

Nothing whatever. Nothing whatever.

THE COURT:

Nobody gets caught off guard?

Me BAKER:

20 No, no. It will be a very friendly session.

THE COURT:

We know how brilliant you are, so that's why I'm asking.

Me BAKER:

Now, is the microphone still on?

25

Me IRVING:

We certainly know that on this side of the table, My Lord. My friend gave us a copy of that editorial. As he said a moment ago, the evidence will in part relate to that. I'm still in the dark as to what the rest of it will relate to. However, I don't imagine that Mr. Megarry, between us, will take more than a couple of hours, so if the Court wouldn't mind sitting, say at eleven o'clock (11H00) on Thursday, that will give Mr. Potter and I time to get back from Ottawa and be ready.

Me BAKER:

In the lunch hour to prepare the cross.

Me IRVING:

That's a very unworthy thought. It's the last thing that would have occurred to me. It was the last thing which occurred to me. As to the eleven o'clock (11H00), that will be all right, My Lord. We will surely finish him during...

THE COURT:

We all agree that Mr. Megarry is not going to take the whole day.

Me IRVING:

Mr. Baker mentioned an hour. It may.

THE COURT:

Okay.

Me POTTER:

My Lord, I wouldn't want my silence to be taken as an acquiescence to anything. It's true Mr. Baker has said that he has -- as he has said, he has sent us a fax copy of an editorial. That it has come and that we have not said anything, I don't want to be taken as an admission that an editorial, which by its nature is a matter of opinion, is at all admissible before you.

THE COURT:

Oh, that's something else.

Me BAKER:

Oh, Mr. Potter, we would never suggest that your silence is to be taken as acquiescence.

Me IRVING:

My Lord, there are one or two other housekeeping matters but they're very brief and I think we could deal with them on Thursday because there will be adequate time.

THE COURT:

Because we may still be here by Thursday...

Me IRVING:

Yes.

THE COURT:

... if we don't leave now.

Me IRVING:

No. I appreciate that, My Lord.

Me BAKER:

Thank you, My Lord.

THE COURT:

So Thursday, eleven a.m. (11H00).

5 Me IRVING:

Thank you, My Lord.

ADJOURNMENT